2007

Common Law and Federalism in the Age of the Regulatory State

Alexandra B. Klass
University of Minnesota Law School, aklass@umn.edu

Common Law and Federalism in the Age of the Regulatory State

Alexandra B. Klass[*]

ABSTRACT: Over the past several decades, the growth of federal statutes and the rise of the regulatory state has weakened and displaced state common law even in the absence of preemption. However, there is a strong theoretical and judicial foundation on which to argue that the existence of statutes, regulations, and the data they generate should be used to inform and develop state common law rather than overshadow or displace it. Moreover, in this current age of the "new federalism," such progressive common law development at the state level may be particularly timely and appropriate. This Article uses these principles to provide a new perspective on the evolution of environmental law from its common law beginnings in tort law, to the flurry of federal statutes and regulations, to present-day state and local environmental-protection initiatives. This Article then argues for increased emphasis on state common law in environmental-protection efforts.

---

* Associate Professor of Law, University of Minnesota Law School. Thanks to David E. Adelman, Curtis Bridgeman, Daniel A. Farber, Bradley C. Karkkainen, J.B. Ruhl, Wayne A. Logan, and Robert V. Percival for valuable suggestions on earlier versions of this Article. I also benefited immensely from comments received at workshops at Florida State University Law School and William Mitchell College of Law. Samuel J. Edmunds and Steven L. Hennessy provided valuable research assistance.

I. INTRODUCTION

The tension between common law and statutory law has existed in this country for over a century. Who decides what the law is? Is it something that is "discovered" or made? To what extent can the courts use the common law to create more tailored legal rights and protections where the legislature has spoken on the general issue? Exploring the relationship between common law and statutory law shows that something has been lost in the recent explosion of statutes and regulations. That something is an appreciation of the power of state common law and its ability to propel progressive legal change.

This Article first observes that along with the growth of federal statutes and the rise of the regulatory state has come a weakening and displacement of state common law even in the absence of express or implied preemption. Rather than viewing this phenomenon as a natural or necessary development as the law matures, however, this Article argues that statutes, regulations, and the data they generate should be used to inform and develop state common law. Moreover, in this current age of the "new federalism," where the Supreme Court has cut back on Congress's ability to regulate broadly in the areas of health, safety, and the environment, such progressive common law development at the state level is particularly timely.

This Article uses the evolution of environmental law from its common law beginnings, to the flurry of federal statutes and regulations beginning in the early 1970s, to present-day state and local environmental-protection initiatives, to argue for a new emphasis on state common law in environmental-protection efforts. The thesis proposes that we should place more emphasis on state common law and explores the extent to which state common law courts can use federal and state statutes, regulations, and scientific developments since the 1970s to strengthen the common law as a means of environmental protection. This integration can bring a new coherence to environmental law. This thesis cuts against the grain of the majority of scholarship since the explosion of federal environmental statutes that began thirty years ago. However, the challenges facing today's efforts to enact and enforce federal law addressing current environmental issues such as global warming, water pollution, and air toxins make a renewed focus on state common law both timely and fruitful.

Part II of this Article introduces some of the key ideas underlying the jurisprudence of the common law and its relationship to statutory law. Part III explores how these ideas developed in the courts from the 1970s through the present day. This Part focuses first on federal common law despite the fact that the role for federal common law in our legal system today is much narrower than that for state common law. Nevertheless, the most robust discussion of the extent to which statutes can play a role in developing the common law occurred in the context of federal common law in the 1970s

and 1980s, precisely when Congress was in the throes of enacting far-reaching environmental statutes. How federal courts grappled with integrating these statutory developments remains instructive for developing state common law today.

Part IV uses the evolution of environmental law during this same time period to illustrate how state common law was often neglected during the rise of the federal environmental-regulatory regime. This Part also discusses the rise of the "new federalism," which has called into question Congress's ability under the Commerce Clause to govern many environmental concerns. Part V draws on federal and state environmental statutes, regulations, and data to provide a new direction for state common law development that allows it to play a more important role in environmental protection. This Part places special emphasis on recent efforts by plaintiffs, particularly state and local government plaintiffs, to push state common law to address modern concerns and compensate for perceived failures by the federal executive and legislative branches in environmental protection. This Part concludes that it is both allowable and desirable to develop a new state common law that incorporates data, standards, and policy principles obtained in the statutory era to provide increased protection for human health and the environment. Such integration will not only enhance environmental-protection efforts but bring a new coherence to the field.

II. THEORETICAL BEGINNINGS

Since the creation of our legal system, we have been a nation of both statutes and common law.[1] How these two forms of lawmaking should influence each other, if at all, began to receive significant treatment in the early twentieth century among major judges and scholars, including Oliver Wendell Holmes, Roscoe Pound, James McCauley Landis, and Benjamin Cardozo.[2] Since then, statutes and regulations in major areas such as criminal law, commercial law, labor relations, and corporate law have significantly or almost completely eclipsed common law.[3] Today, because of

1. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1, 5 (1982); WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION 559–60 (3d ed. 2001) (describing various sources of lawmaking power).

2. *See* ESKRIDGE ET AL., *supra* note 1, at 562–67.

3. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. d (Proposed Final Draft 2005) (stating that the doctrine of negligence per se has become increasingly important in recent decades "as the number of statutory and regulatory controls has substantially increased"); CALABRESI, *supra* note 1, at 1 (stating that in the last fifty to eighty years, we have seen a "fundamental change in American law" in that "we have gone from a legal system dominated by the common law . . . to one in which statutes, enacted by legislatures, have become the primary source of law"); *id.* at 44 ("The statutorification of American Law can in one sense be dated from the New Deal."); GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977) ("Between 1900 and 1950 the greater part of the substantive law, which before 1900 had been left to the judges for decision in light of common law principles, was recast in statutory form."); MORTON J. HORWITZ, THE

the prominence of statutory law in these and many other areas, statutes and common law often seem to be separate islands of the law. However, a rich tradition of legal theory supports the idea that statutes should inform common law. This tradition is discussed below, with a focus on how this scholarship supports developing a common law informed by statutes in the environmental-protection area.

A. FROM COMMON LAW TO STATUTORY LAW

This Section highlights the writings of the early legal scholars and judges who first grappled with the need to integrate developments in statutory law and social policy into common law. While these writers often had distinct and conflicting theoretical views and practical agendas, they all played important roles in focusing on the development of common law during the rise of the regulatory state.[4] This theoretical foundation provides initial support for relying on statutory and policy developments in environmental law to expand common law.

In the early part of the twentieth century, Justice Oliver Wendell Holmes argued forcefully that the law was not a neutral set of principles to be discovered.[5] Rather, the law is a product of judges balancing policies with a goal of achieving a pragmatic and utilitarian solution.[6] Holmes rejected the idea that certain principles were valid in all times and circumstances, set apart from politics and social reality.[7] Instead, the judge's role was to enforce positive law, not existing and fixed "natural law."[8] In his well-known book, *The Common Law*, Holmes declared that although judges rarely acknowledge it expressly, the growth of law is primarily legislative in nature and draws from all aspects of life and the community.[9] Consistent with this, Justice Holmes urged judges to take a broad view of the law and consider whether

---

TRANSFORMATION OF AMERICAN LAW 1870–1960, at 254 (1992) (describing efforts undertaken in the 1950s by H.L.A. Hart and Albert M. Sacks to move academic legal thought from a pre-New Deal focus on common law to emphasize instead "the major roles that statutory and administrative law had come to play in the state").

4. *See, e.g.*, HORWITZ, *supra* note 3, at 169–70, 209, 217–22 (discussing disputes between major figures in Legal Realist movement and lack of coherence within that movement).

5. ESKRIDGE ET AL., *supra* note 1, at 562.

6. *Id.*; OLIVER WENDELL HOLMES, THE COMMON LAW 35 (Little, Brown & Co. 1938) (1881) ("Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . . ."); *see also* HORWITZ, *supra* note 3, at 140 (describing Oliver Wendell Holmes, *The Path of Law*, *in* COLLECTED LEGAL PAPERS 167–202 (1920) as the "first clear articulation of legal positivism—that is, an insistence on a sharp distinction between law and morals—by any American legal thinker").

7. *See* ESKRIDGE ET AL., *supra* note 1, at 562 (describing Holmes's opinion about the conflict between common law and statutes when deciding cases); HORWITZ, *supra* note 3, at 142 (referring to Holmes's conception of common law).

8. HOLMES, *supra* note 6, at 35–36.

9. *Id.* (declaring that the law draws from "all the juices of life," meaning "considerations of what is expedient for the community concerned").

past reasons for a particular rule were still valid and, if necessary, revise the law to maintain continuous growth.[10]

Justice Holmes's ideas stood in marked contrast to the prevailing idea at the time, expressed by William Blackstone and others, that judges do not "make" law but simply "declare" existing, objective law that does not favor one group or person over another.[11] In other words, judges are simply applying rules and principles of the natural order when they decide cases. Under this legal theory, statutes should not be used to formulate common law rules.[12] Statutes are political and ad hoc, while common law is based on the discovery of pre-existing legal principles developed gradually.[13]

Whether and how to incorporate legislative policies and regulatory expertise into common law decisionmaking was debated in the Supreme Court in the years surrounding the Court's decision in *Lochner v. United States*.[14] *Lochner* was one of many cases the Court decided between the late 1880s and the 1930s in which the Court used the Due Process Clause of the U.S. Constitution to scrutinize and often invalidate state and federal economic legislation.[15] In *Lochner*, the Court rejected New York's claim that its sixty-hour limit on the work week of bakery employees was reasonably related to the promotion of employee health.[16] The Court invalidated the regulation as an interference with the contractual rights of employers and workers.[17] This substantive due-process approach was based in part on the theory that these progressive legislative efforts unconstitutionally interfered with contract and with natural common law principles.[18]

By contrast, Holmes argued that judges should defer to legislative efforts in these areas because, "[i]f law is merely a battleground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests."[19] Many of those Justices who strictly scrutinized economic legislation may have justified their actions as

---

10. *See id.* at 36–37.

11. ESKRIDGE ET AL., *supra* note 1, at 560–62.

12. *Id.*

13. *Id.*

14. Lochner v. United States, 198 U.S. 45, 59–64 (1905) (striking down a New York statute limiting the working hours of bakery workers on the grounds that it violated the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment).

15. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1343–48 (3d ed. 2000) (summarizing due-process caselaw).

16. *Lochner*, 198 U.S. at 58.

17. *Id.* at 61–62.

18. TRIBE, *supra* note 15, at 1358–59 (stating that economic realities of the Depression marked the end of the "substantive due process doctrine that legislatures may not upset the 'natural' conditions of contract and property enshrined in common law categories and their logical entailments"); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 154 (rev. ed. 1994) ("Legitimate acts of legislation were understood to be limited by the principles of natural rights that were the foundation of the society.").

19. HORWITZ, *supra* note 3, at 142.

nothing more than upholding common law natural rights rather than affirmatively protecting laissez-faire economics.[20] By the mid-1930s, however, personnel changes on the Court, public pressure, and the economic realities of the Depression began to tip the balance in favor of Holmes's view on legislative deference.[21] As a result, the 1930s marked the end of the Court's reliance on natural law to resist legislative policy changes and the beginning of the Court's deference to legislative efforts on economic issues.[22]

These developments set the stage for Congress, state legislatures, and administrative agencies to dominate large areas of the law formerly controlled by common law.[23] In the 1930s, these efforts focused primarily on economic and labor issues.[24] However, with the rise of the environmental movement in the 1970s, the groundwork Holmes and his followers laid allowed the creation of a vast regulatory framework to address environmental-protection issues previously left to common law.

B. INTEGRATING STATUTORY LAW INTO COMMON LAW

Legal theorists who followed Holmes did not advocate that common law be altogether abandoned. Instead, these new legal scholars and judges argued that the law must use statutory developments to shape common law.[25] Indeed, much of their effort focused on the important task of how best to expand and refine common law to incorporate the new statutory policies and the regulatory expertise that accompanied them.[26] As stated earlier, these scholars were not of one mind in how they viewed the role of the law and the desired path of legal change. Nevertheless, they all, in their own way, argued for a strong interrelationship between the common law and legislative developments.[27]

One of these scholars was Dean Roscoe Pound who, in the 1920s, lectured on the common law's role in a time when Congress began in earnest to delegate a significant amount of rulemaking authority to

---

20. WOLFE, *supra* note 18, at 153–56.

21. TRIBE, *supra* note 15, at 1358–60.

22. WOLFE, *supra* note 18, at 160–62. For instance, Cardozo's "progressive" critique of laissez-faire jurisprudence was that, even if such jurisprudence was lawful in the past, it was not lawful in the present because judges must incorporate the ideas of economists and social scientists about present conditions. *Id.* at 235.

23. *See supra* note 3 and accompanying text (introducing a discussion of the current dominance of statutory law).

24. *See* TRIBE, *supra* note 15, at 1358–62 (discussing legal, economic, and political changes of the 1930s).

25. *See* ESKRIDGE ET AL., *supra* note 1, at 562–63; WOLFE, *supra* note 18, at 161 (discussing legal scholars' arguments about the use of statutory developments to shape common law).

26. *See* HORWITZ, *supra* note 3, at 230–40 (discussing debates over the role of scientific expertise and the regulatory state in development of the law).

27. *See supra* Part II.A (discussing the transition from common law to statutory law).

executive agencies and boards.[28] In a series of lectures given at Dartmouth College in 1921, later published as *The Spirit of the Common Law*,[29] Pound focused on common law's key role in shaping our legal system. He argued that despite the current trend to focus on legislative and executive lawmaking efforts exclusively, common law must continue to play a central role. According to Pound, common law remained necessary "to fill the gaps in legislation, to develop the principles introduced by legislation, and to interpret them."[30] More importantly, he also warned that the role of the courts is not merely to interpret existing legislation, but to incorporate the results of legislation into the body of tradition.[31]

Pound believed common law was so well-suited to a central role in legal development because it was unique in its ability to combine precedent and certainty with the power to change to meet new societal needs.[32] The common law was not just a function of precedent and stability; it should be influenced by current social ideals to bring about progressive legal change.[33] Indeed, Pound argued that common law was already integrating such changes and had thus slowly shifted away from the "individualistic" justice of the last century to a more socially conscious justice even before similar changes in legislative policy became widespread.[34] These same principles were present again several decades later in environmental law. As discussed in Part IV, in the 1970s, the environmental movement was one of the "social justice" issues changing the legal and political landscape, resulting in common law developments as well as the creation of federal and state statutes.[35]

Also in the 1920s, Justice Benjamin Cardozo emphasized the continuing importance of common law, focusing less on the role of common law vis-à-vis statutes and more on the duty of individual judges to consider present-day morals and social values in shaping the law. In a series of lectures delivered at Yale University, later published in 1921 as *The Nature of the Judicial Process*,[36]

---

28. *See* HORWITZ, *supra* note 3, at 217–22 (discussing Pound's writing on the growth of the administrative state).

29. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (Transaction Publishers 1999) (1921).

30. *Id.* at 174.

31. *Id.* at 174–75.

32. *Id.* at 182.

33. *Id.* at 190.

34. POUND, *supra* note 29, at 185. *But see* ESKRIDGE ET AL., *supra* note 1, at 563 (stating that "[a]n implication of Pound's position . . . was that the role of courts in a democratic society should be the elaboration and application of statutory policy, rather than the direct creation of public policy in the common law").

35. *See, e.g.*, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION (4th ed. 2003) (discussing the rise of the environmental movement and the "explosion" of federal environmental legislation beginning in the 1970s).

36. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

Cardozo focused on the judge's duty to maintain a relationship among law, morals, jurisprudence, reason, and good conscience.[37] In doing so, the judge should feel free to abandon rules that no longer are consistent with the current day's sense of justice and social welfare.[38] If the rules of law from a prior generation are no longer appropriate or relevant, then common law judges should abandon them in favor of growth and not wait for the legislature to take action.[39]

Cardozo recognized that many might argue that judges should not have the power to change the law based on their subjective views. He responded, however, that the judge is duty-bound by the Constitution to interpret "the mores of today" as best he can.[40] Cardozo had faith that good judges would "do their homework" and rely on applied social sciences, expert research, and the data being generated by the new federal agencies.[41] Thus, Cardozo argued judges had an obligation to integrate administrative expertise and social development into common law.

In the 1930s, as the role of statutes and administrative agencies loomed even larger, scholars such as Dean James McCauley Landis argued for a greater interdependence between the growing administrative state and common law.[42] Even more than his predecessors, Landis argued that judges could use statutes to determine social mores and that statutory principles and agency expertise should inform common law as it develops.[43]

In his oft-cited article, *Statutes and the Sources of Law*, Landis began by announcing that the primary difference between nineteenth- and twentieth-century legal theories was the focus on "the judge as a creative artist" in making the law.[44] Landis argued that even though the major portion of our law now derived from statutes, judges had refused to incorporate these

---

37. *Id.* at 133–34; *see also* WOLFE, *supra* note 18, at 230 (stating that Cardozo's approach to judging was that the judge should determine the direction of the law with reference to "logic, history, custom, and sociology").

38. CARDOZO, *supra* note 36, at 150.

39. *Id.* at 151–52.

40. *Id.* at 133–35; John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1335 (1990) (stating that, according to Cardozo, "the proper function of the law is to articulate and enforce at least some of the obligations recognized by the community"). *But see* WOLFE, *supra* note 18, at 238 (stating that Cardozo's response in his book to potential concerns regarding abuse of judicial power was "not very clear").

41. Goldberg, *supra* note 40, at 1368.

42. James M. Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213, 233 (1934) ("The consciousness that the judicial and legislative processes are closely allied both in technique and in aims will inevitably make for greater interdependence of both.").

43. *Id.* at 232–33 ("If it be true that law reflects and should reflect experience rather than logic, legislation born of such an urge demands careful and sympathetic consideration."); *see also* HORWITZ, *supra* note 3, at 213–16 (discussing Landis's emphasis on the benefits of agency expertise).

44. Landis, *supra* note 42, at 213.

developments in their historic approach to the law.[45] Landis suggested that the rise of both the social sciences and legislation required new methods of judicial development of law beyond mere statutory interpretation.[46] Thus, he proposed that judges attempt to distill from a statute its basic purpose and use that purpose to advance the law. In this way, even a general statute could add meaning to the law beyond its specific application.[47]

Landis also argued that society was becoming more complex and legislation had expanded and improved. Thus, it was no longer feasible or desirable to confine the legislative process to mere rulemaking and the judicial process to the mere interpretation of statutes.[48] Landis thought that judges' then-current refusal fully to consider statutes as precedent in deciding common law was certain to be a passing phenomenon and that legislative and judicial processes would inevitably become more interdependent.[49] This focus on incorporating legislative and agency expertise into the development of the common law was likely based in large part on his experience as a federal regulator and his strong general support for the growth of the administrative state.[50]

Starting in the 1960s, judges such as Henry J. Friendly began again to emphasize the need for the common law to develop and expand by drawing on the growing number of statutes and agency regulations to formulate sound policy and address current societal needs.[51] According to Friendly and others, in relying on legislative provisions to address situations beyond those expressly within the purview of the statute itself, judges were not simply interpreting statutes but developing common law.[52] This new emphasis on common law came at a time of great social change when the country was

45. *Id.*

46. *Id.*

47. *Id.* at 216.

48. *Id.* at 219–20; *see also* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 14 (1936) (stating that judges should recognize the "social policy and judgment expressed in legislation" in forming common law).

49. Landis, *supra* note 42, at 233 ("The present attitude responsible for our cavalier treatment of legislation is certain to be a passing phenomenon.").

50. Landis was the Chairman of the Securities and Exchange Commission before returning to Harvard Law School as Dean in 1937. Much of Landis's writing from this time focused on the benefits of administrative-agency expertise and why that expertise justified the growth of the administrative state and its rulemaking powers. *See* HORWITZ, *supra* note 3, at 213–16. *See generally* JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

51. *See* Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791–92 (1963) [hereinafter Friendly, *The Gap in Lawmaking*]; *see also* Roger J. Traynor, *Statutes Revolving in Common Law Orbits*, 27 CATH. U. L. REV. 401, 402, 419 (1968). *See generally* Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429 (1960) (detailing administrative agency deficiencies including delays of process, failure to address problems before they reach a state of crisis, ad hoc determinations, and failure to let industry and agency staff know where they stand).

52. Friendly, *The Gap in Lawmaking*, *supra* note 51, at 792.

dealing with important issues of race relations, poverty, general civil unrest, and the beginnings of the environmental movement. These judges argued that common law can and should play a major role in addressing the social and policy issues of the day and should not leave resolution of those issues exclusively to legislatures and agencies.[53] In other words, the continuing proliferation of statutes and regulations should empower, not eclipse, common law.

Twenty years later, in 1980, Judge Guido Calabresi took up the issue of the relationship between statutes and common law in his book, *A Common Law for the Age of Statutes.* In it, he called on judges to develop common law by using their common law powers to repeal statutes that have become obsolete.[54] In making such an apparently radical suggestion, Calabresi was careful to point out that his proposal was not an effort to ordain judges as the primary lawmakers. He recognized that courts are often simply unable to act with the speed or breadth necessary for today's societal needs.[55] He emphasized, however, that courts and common law should still play a significant role in lawmaking, not only in traditional common law areas, but also in those areas of the law governed by statute.[56] In filling this role, courts would be doing what they have traditionally done—providing both continuity and change in applying legal precedent to new factual situations.[57]

Calabresi spent a significant portion of his book explaining why judges could play such a central role in direct lawmaking despite their lack of specialized expertise and their distance from the electorate.[58] He argued that even though judges' relationship to the electorate was "at best problematic[]," it could be called democratic because the requirements of "principled" decisionmaking limited the scope of judicial authority.[59] Because of the incremental nature of common law adjudication, no single judge could change the law broadly, and a group of judges could do so only slowly and in response to changed attitudes in the public domain.[60] More importantly, elected legislatures could always reverse judicial decisions when those decisions were sufficiently at odds with the will of the majority.[61] Calabresi concluded that courts, historically, have engaged in judicial

53. *Id.*

54. CALABRESI, *supra* note 1, at 7.

55. *Id.* at 163.

56. *Id.*

57. *Id.* at 165.

58. *See, e.g., id.* at 93 ("What justifies court power to make temporary rules and thereby to assign the burden of overcoming inertia and of getting those rules revised? . . . What justifies courts in making law within the boundaries set by legislative inertia?").

59. CALABRESI, *supra* note 1, at 4.

60. *Id.* at 94.

61. *Id.* at 4.

lawmaking in a democracy, they have the training to perform this function, and thus, judges could justifiably exercise authority to address legislative inertia by repealing obsolete statutes.[62]

Regardless of whether judges should have the power to repeal obsolete statutes in the manner Calabresi proposed, legal theory expressed over time supports the idea that common law should continue to be a strong, vibrant force of legal change.[63] Judges should not put blinders on and look only to judicial precedent in applying and shaping the law. Instead, judges are duty-bound to consider the social, economic, and scientific data, and policy that exists in statutory statements and agency-generated information. In the absence of express or implied preemption,[64] statutes and regulations should help shape common law, not render it obsolete.

The legal theorists discussed above, while certainly not of one mind on many issues, all saw common law as a vehicle for dynamic legal change that fully encompassed statutory law, data, and public policy as it developed through time. In other words, the growth of the regulatory state should complement, not displace, common law. As discussed in later sections, this dynamic use of common law has been underutilized in environmental protection. Ultimately, despite the growth of the regulatory state in

62. *Id.* at 118–19.

63. Jack Davies, a law professor, Minnesota Court of Appeals Judge, and member of the Minnesota Senate, introduced a bill in the Minnesota Legislature in 1979 entitled the Nonprimacy of Statutes Act, which provided that twenty years after a statute is enacted or amended, it matures into something comparable to a principle of common law that can be limited, extended, qualified, or even overruled by courts. *See* Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 203–04 (1979). Davies argued that obsolete statutes represented a failure of the legal system and that the ability of the judiciary to overrule such statutes was consistent with the legal tradition of Landis, Pound, Stone, and Traynor and would create a "better lawmaking partnership between courts and legislatures." *Id.* at 230.

64. Federal preemption, or displacement, of state statutory or common law is based on the Supremacy Clause of the U.S. Constitution, which provides that the Constitution and laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824) ("In every such case [where state laws are contrary to federal law], the act of Congress or the treaty, is supreme; and the law of the [S]tate, though enacted in the exercise of powers not controverted, must yield to it."). Preemption can be: (1) express, where federal law specifically states that it preempts state law in that area; (2) implied, where, although not expressly stated, it is clear that Congress intended to regulate completely a particular area; and (3) resulting from actual conflict, where federal law controls if there is a conflict between federal and state law. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280–81 (1987) (conducting the analysis for implied preemption, but ultimately not finding it); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (finding conflict preemption); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (finding express preemption); *see also* TRIBE, *supra* note 15, at 1172 (discussing the three categories of preemption). Courts generally apply a presumption against displacing state law in the absence of an express intent by Congress to preempt such law. This is due to the important role of state sovereignty in our federal system of government. *See* TRIBE, *supra* note 15, at 1175–76.

environmental law and many other areas, the United States is still a nation founded upon common law. Our legal system is more robust and responsive when judges use all existing tools and authority to advance common law. Even though environmental law is a relatively new field, the standards, data, and policy in environmental statutes and regulations should play a significant role in the development of common law. Below is a discussion of how judges and lawyers should begin to shape common law by integrating the new tools of the environmental-regulatory state.

III. JUDICIAL USE OF STATUTES IN COMMON LAW DEVELOPMENT

Although the theoretical power for a vibrant common law infused with statutes and regulatory data exists, courts do not use it on a widespread basis. The cases in which it has been used, however, provide significant guidance for future developments in this area.

The focus of this Article is the development of state common law. However, this Part begins with a discussion of federal common law. Since the Court's adoption of the "*Erie* Doctrine" in *Erie Railroad Co. v. Tompkins*,[65] the role of federal common law is quite narrow as compared with state common law. Nevertheless, it was in the context of federal common law that the courts first grappled expressly with the issue of how and to what extent statutes should inform common law. These judicial efforts also occurred during the precise time period when Congress was in the midst of creating the field of federal environmental law. As a result, these federal common law cases contain valuable lessons for present-day efforts to develop and strengthen state common law based on related statutes, regulations, and the policies behind them.

A. *THE EXAMPLE OF* MORAGNE V. STATES MARINE LINES, INC.

In a 1970 admiralty case, *Moragne v. States Marine Lines, Inc.*, the U.S. Supreme Court expressly embraced the idea that statutes can and should inform the development of common law.[66] In setting forth a framework for this type of common law development, albeit in the context of the federal common law of admiralty, the Court not only embraced the work of Pound, Landis, and Cardozo but also provided an example that can apply to the development of state environmental common law.

In *Moragne*, a widow sued for the wrongful death of her longshoreman husband when he was killed while working on a ship in American territorial waters. Although federal statutes governing wrongful death of seamen

65. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision).

66. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); *see also* CALABRESI, *supra* note 1, at 151–52.

existed, none of them covered this precise situation.[67] Federal and state statutes had largely abolished the common law rule prohibiting actions for wrongful death, but the plaintiff in *Moragne* had the misfortune to fall between the cracks left by the various statutes. She was forced to rely on federal common law, which, at that time, did not provide a remedy.[68]

In his opinion for the Court, Justice Harlan declared that "there is no present public policy against allowing recovery for wrongful death."[69] In overruling a prior Court decision barring recovery for wrongful death in admiralty cases, Harlan stated that the wide legislative rejection of the rule "carrie[d] significance beyond the particular scope of each of the statutes involved."[70] The new legislative policy "thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law."[71] In support of that proposition, Harlan cited Landis, Holmes, and Pound.[72]

Harlan quoted and extensively paraphrased passages from Landis's *Statutes and the Source of Law.* Most significantly, Harlan stated that "[i]t has always been the duty of the common law court to perceive the impact of major legislative innovations and interweave the new legislative policies with the inherited body of common law principles—many of them derived from earlier legislative enactments."[73] Harlan explained that legislation throughout the country had made claims for wrongful death the general rule and that nothing in the statutes governing wrongful death in maritime law[74] expressed an intent to foreclose recovery in the situation presented.[75]

---

67. The Jones Act provided a cause of action for the negligent death of a seaman, and the Death on the High Seas Act ("DOHSA") provided a cause of action for the wrongful death of workers on the high seas. *See generally* Fisheries Amendments of 1982, Pub. L. No. 97-389, 96 Stat. 1949 (codified at 46 U.S.C. app. § 688 (1988)); Death on the High Seas Act, ch. 111, 41 Stat. 537 (1920) (codified as amended at 46 U.S.C. app. §§ 761–768 (1988)). The Jones Act and its amendments arguably did not apply because the plaintiff's husband was a longshoreman, not a seaman, and the claim the Court considered was for unseaworthiness, not negligence against the defendant. The DOHSA also did not apply because the plaintiff's husband died in U.S. territorial waters, not on the high seas. *See Moragne*, 398 U.S. at 376; *see also* Daniel A. Farber & Phillip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 896 (1991) (discussing *Moragne* and the fact that the plaintiff "had fallen into a hole in the statutes due to the combination of the nature of the wrongful conduct and the place of the accident"). Florida state law also did not provide a cause of action for wrongful death under these circumstances. *See Moragne*, 398 U.S. at 376.

68. *See* The Harrisburg, 119 U.S. 199, 213–14 (1886) (prohibiting action for wrongful death in admiralty cases).

69. *Moragne*, 398 U.S. at 390.

70. *Id.*

71. *Id.* at 390–91.

72. *Id.* at 390–92.

73. *Id.* at 392 (citing Landis, *supra* note 42, at 215–16, 220–22).

74. *See supra* note 67 and accompanying text (discussing the Jones Act and DOHSA as the statutes governing wrongful death in the context of maritime law).

75. *Moragne*, 398 U.S. at 392–402.

Harlan thus concluded that the refusal of maritime law to provide a remedy "appears to be jurisprudentially unsound" and the refusal should end unless "substantial countervailing factors" require adherence to the Court's common law precedent as a matter of stare decisis.[76] In overruling the prior case, Harlan noted that recovery for wrongful death was the expected norm and barring such claims was "the exceptional denial of recovery that disturbs these expectations."[77] Thus, innovations in the federal common law would serve to strengthen, not disturb, the law's stability.[78]

As is obvious, *Moragne* is a case in admiralty. As a result of its special status in the U.S. Constitution,[79] admiralty law often has limited direct application to other fields. Accordingly, it is unsurprising that *Moragne* did not result in a widespread embrace of the principles of Pound, Landis, and Cardozo in common law development in other areas.[80] However, Harlan's use of statutory principles to decide a matter of common law is important. *Moragne* is not direct authority for any particular matter of state common law or even federal common law outside admiralty. Nevertheless, the case's analysis can be embraced by any court applying or developing the common law when there are related but not directly applicable statutes.

The growth of the doctrine of negligence per se, where violation of a civil or criminal statute provides the standard of care in a common law negligence action, is an obvious example of the common law's reliance on statutes.[81] Using criminal and civil statutes to determine whether a contract is in furtherance of an illegal purpose in a breach of contract action is another example of the connection between the two sources of law.[82] While these legal developments are not attributable to *Moragne*, they show that courts use statutes to develop common law in a similar manner.

---

76. *Id.* at 402–03.

77. *Id.* at 404.

78. *Id.* (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 485, 574–77, 585–95, 606–07 (10th ed. 1958)). *See generally* Roscoe Pound, *Some Thoughts About Stare Decisis*, 13 NACCA L.J. 19 (1954).

79. The federal courts derive their exclusive jurisdiction over this field from the Judiciary Act of 1789 and from Article III, § 2 of the U.S. Constitution. U.S. CONST. art. III, § 2 ("The judicial Power [of the United States] shall extend . . . to all Cases of Admiralty and maritime Jurisdiction."); Judiciary Act of 1789, ch. 20, 1 Stat. 73.

80. *See* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 893–97 (1982) (arguing that broad application of *Moragne* and its principles "has been no more than a mirage" and citing examples of the Supreme Court's refusal in various cases to "correct iniquities" and consider "contemporary notions of fairness" arising after a statute's enactment).

81. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS § 14 cmt. d (Proposed Final Draft 2005) (stating that the doctrine of negligence per se has increased in importance in recent decades "as the number of statutory and regulatory controls has substantially increased"); Robert F. Williams, *Statutes as a Source of Law Beyond Their Terms*, 50 GEO. WASH. L. REV. 554, 571–72 (1982).

82. *See* Williams, *supra* note 81, at 573–76.

As stated earlier, the principles of common law development Harlan used in *Moragne* can be easily applied to state or federal common law. Before focusing on the use of these principles in developing state common law, however, a detour into federal common law in the context of environmental law is illuminating. The Supreme Court has never cited *Moragne* for the principle that statutes should influence federal common law development. It has, however, reviewed one lower court decision that did rely extensively on *Moragne* to move federal common law forward based on principles expressed in statutory policy in order to enhance environmental protection. In that decision, *Milwaukee v. Illinois*,[83] discussed in the next section, the Court made clear that the limitations it was placing on the use of federal common law to promote environmental protection did not apply to the development of *state* common law. Thus, current Supreme Court precedent in this area in no way forecloses a renewed look at the principles Harlan expressed in *Moragne* for the purpose of developing a more robust state common law for environmental-protection purposes today.

B. *REDUCING THE ROLE OF FEDERAL COMMON LAW IN* MILWAUKEE V. ILLINOIS

We now turn from admiralty law to environmental law—specifically the short-lived development of federal common law regulating the environment. Once again, the precedent in this area is not directly applicable because the focus of this Article is state common law. However, we address federal environmental common law because it provides an important history of the development of environmental law at its most crucial time. Moreover, while the Court ultimately rejected most federal environmental common law, there is still ample room for *state* common law to play a significant role in protecting the environment.

The story of federal environmental common law begins and ends with *Illinois v. Milwaukee* (*Milwaukee I* and *Milwaukee II*).[84] In the first case, the State of Illinois sought leave to file an original action with the Supreme Court against four Wisconsin cities and certain sewerage commissions for pollution of Lake Michigan. Illinois alleged that the defendants were discharging 200 million gallons of raw or inadequately treated sewage daily into the Lake in the Milwaukee area alone.[85] Illinois sued under the federal common law of nuisance and asked the Court to abate the nuisance.[86]

---

83. Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981).

84. Illinois v. Milwaukee (*Milwaukee I*), 406 U.S. 91 (1972); *Milwaukee II*, 451 U.S. 304.

85. *Milwaukee I*, 406 U.S. at 93.

86. *Id.* Federal common law nuisance is a form of "public nuisance" defined as "unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B (1979). Conduct is deemed "unreasonable" if (1) it involves a "significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience"; or (2) "the conduct is proscribed by statute, ordinance or administrative regulation"; or (3) "the conduct is of a continuing nature or has produced a

The Court, in a 1972 opinion by Justice Douglas, refused to take original jurisdiction of the case.[87] However, in considering whether the action could be brought in federal district court, the Court surveyed federal law governing navigability and pollution of state waters and held first that federal law, not state law, controlled the pollution of interstate or navigable waters.[88] Moreover, the Court explained that statutory remedies were not the only federal remedies available.[89] Thus, an injunction could be granted even though it was not "within the precise scope of remedies prescribed by Congress."[90] Douglas noted that it "is not uncommon for federal courts to fashion federal law where federal rights are concerned," and that when "we deal with air and water in their ambient or interstate aspects, there is a federal common law."[91]

Following *Milwaukee I*, Illinois filed suit in Illinois federal district court, the case proceeded to a four-month trial, and the district court entered a judgment forcing the defendants to treat their sewage more stringently than the obligations imposed under the federal statute and the defendants' permits issued under that law.[92] On appeal, the defendants argued that significant amendments to the Federal Clean Water Act in 1972 and 1977 were so comprehensive as to preempt the federal common law of nuisance, thus leaving the statute as the only federal relief available.[93]

In rejecting this argument, the Court of Appeals for the Seventh Circuit first noted the Supreme Court's holding in *Milwaukee I* that the federal water-pollution statute, prior to the amendments, did not preempt the federal common law of nuisance.[94] The court then concluded that although

---

permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id.* § 821B(2). Thus, nuisance liability can be strict in that legal, nonnegligent conduct can be an actionable nuisance if the interference with public health or safety is significant. *See* M. STUART MADDEN & GERALD W. BOSTON, LAW OF ENVIRONMENTAL AND TOXIC TORTS 57–58 (3d ed. 2005). A private party can sue for public nuisance only if it can show "special damages." RESTATEMENT (SECOND) OF TORTS § 821C. By contrast, a private party can sue for private nuisance to obtain injunctive relief and/or compensatory damages for a nontrespassory invasion of another's interest in the private use and enjoyment of land so long as the invasion is either (1) "intentional and unreasonable" or (2) unintentional but otherwise negligent, reckless, or based on conduct that is abnormally dangerous. *See id.* §§ 821D, 822.

87. *Milwaukee I*, 406 U.S. at 108.

88. *Id.* at 102 n.3 (rejecting the implication in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493, 498 n.3 (1971), that state nuisance law was controlling).

89. *Id.* at 103.

90. *Id.*

91. *Id.*

92. Milwaukee v. Illinois, 599 F.2d 151, 155, 163 (7th Cir. 1979), *rev'd*, 451 U.S. 304 (1981).

93. *Milwaukee*, 599 F.2d at 157 (citing Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566).

94. *Id.* at 158.

the 1972 and 1977 amendments substantially strengthened the federal statute and created a permit system, Congress expressly included various savings clauses in the law. As a result, Congress did not intend to preempt either state law or the federal common law of nuisance.[95]

The court stated, however, that the federal statute and permits were not "irrelevant." In a section titled "Common Law of the Statute," the court explained that a statute that does not explicitly govern a case "may contain indications of the legislature's judgment on relevant issues of policy or provide an appropriate principle for decision of the case."[96] In support of that proposition, the court cited *Moragne*,[97] Landis and other scholars,[98] and the similar statement in *Milwaukee I*.[99]

The court reasoned that, although the federal statute contained no rules or principles that controlled the case, the minimum-treatment standards and effluent limitations imposed under the law provided a relevant starting point.[100] However, the court continued, if those limitations were not sufficient to protect Illinois residents from harm, more stringent requirements could be imposed under federal common law.[101] In affirming the district court order imposing requirements beyond those contained in the federal permits issued to the defendants, the court looked to the general requirements "implicit" in the statute forbidding the discharge of raw sewage into public waters.[102] Thus, expressly using the principles and theory of *Moragne*, the court looked to the statute's general policy, together with the evidence gathered at trial, to advance federal common law and impose stricter standards than those required by the administrative bodies directly applying the statute and issuing the permits.

This use of *Moragne* in the context of the federal common law of nuisance was short-lived. The Supreme Court granted certiorari in the case and reversed the Seventh Circuit's decision in 1981 (*Milwaukee II*).[103] In the

95. *Id.* at 162–63 (citing 33 U.S.C. §§ 1365, 1370, 1371(a)). The court also rejected the argument that even in the absence of preemption, federal common law could not provide for more stringent relief than that allowed under federal statute. *Id.* at 163–64.

96. *Id.* at 164.

97. *Id.* at 164 n.22 (citing Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390–93, 406–08 (1970)).

98. *Milwaukee*, 599 F.2d at 164 n.22 (citing Landis, *supra* note 42, at 7, 12–19, 21–22; William H. Page, *Statutes as Common Law Principles*, 1944 WIS. L. REV. 175, 186–211; Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 20–22 (1966); Stone, *supra* note 48, at 4, 14–15; Traynor, *supra* note 51, at 401, 403–08, 412–17, 421–24).

99. *Id.* at 164 (citing *Milwaukee I*, 406 U.S. 91, 103 n.5 (1972) ("While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.")).

100. *Id.*

101. *Id.* at 165.

102. *Id.* at 170–71.

103. *Milwaukee II*, 451 U.S. 304 (1981).

opinion, Justice Rehnquist began by stating that federal courts, unlike state courts, "are not general common law courts and do not possess a general power to develop and apply their own rules of decision."[104] Moreover, elected representatives, not federal courts insulated from the democratic process, should enact federal rules in areas of national concern.[105] Thus, although federal common law may be necessary in a few, select instances, once Congress addresses a question previously governed by federal common law, there is no longer a need for the federal courts to conduct their own exercise in lawmaking.[106] Indeed, the opinion declares that the principle of separation of powers is too fundamental to give primacy to federal judicial policymaking where Congress has already addressed the issue.[107]

Rehnquist made clear that analyzing whether federal statutory law governs a question formerly within the province of federal common law is not the same as determining whether federal statutory law preempts state law. In considering the latter question, principles of federalism require that a federal statute will not preempt historic state police power absent the clear and manifest intent of Congress.[108] Indeed, the Court noted that since the states are represented in Congress but not in the federal courts, the presumption against displacement of state law is consistent with a presumption in favor of displacement of federal common law.[109] Accordingly, despite the lack of room for federal common law, the Court was careful to leave open the possibility for states to adopt more stringent limitations than federal law through state administrative processes or application of their own common law of nuisance.[110]

Milwaukee II was significant with regard to the development of federal common law. First, after *Milwaukee II*, the federal common law of nuisance appears to have had little role in environmental-protection efforts. Indeed, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, a decision released the same year as *Milwaukee II*, the Court extended its decision in *Milwaukee II* to hold that even a defendant who is violating the Federal Water Pollution Control Statute is immune from federal common

104. *Id.* at 312–13 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32–33 (1812)).

105. *Id.* at 312–13 & n.6 (citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 497 (1954)).

106. *Id.* at 313–14; *see also id.* at 314 (citing to a portion of *Milwaukee I*, 406 U.S. 91, 107 (1972), where the Court held that federal common law would apply until the field was subject to comprehensive legislation or authorized administrative standards).

107. *Id.* at 315.

108. *Milwaukee II*, 451 U.S. at 316 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

109. *Id.* at 317 n.9.

110. *Id.* at 327–28.

law nuisance liability.[111] Although several states have recently sued power plants in the Midwest under the federal common law of nuisance to prevent emissions of carbon dioxide that cross state lines, the U.S. District Court for the Southern District of New York dismissed such an action in 2005. The court held that the suit implicated so many areas of national and international policy as to be a nonjusticiable political question consigned to the political branches.[112] Apart from this most recent effort, lawsuits involving the federal common law of nuisance have been essentially nonexistent since *Milwaukee II*.[113]

Notably, efforts to use the principles expressed in *Moragne* to develop federal common law for environmental-protection purposes were short-lived because of the Court's presumption *in favor* of a federal statute displacing federal common law. By contrast, the Court preserved the presumption *against* a federal statute displacing state common law. Therefore, the decision did not foreclose and, in fact, arguably promoted the use of state common law to address pollution issues where federal statutory and regulatory laws fall short.

C. *CONFIRMING THE CONTINUED ROLE OF STATE COMMON LAW IN* INTERNATIONAL PAPER CO. V. OUELLETTE

In 1987, in *International Paper Co. v. Ouellette*, the Supreme Court confirmed its statement in *Milwaukee II* that while federal common law was no longer available to pursue environmental-protection goals where a comprehensive federal statute exists, state common law was still available.[114] In *Ouellette*, Vermont landowners sued the operator of a New York pulp-and-paper mill under the Vermont common law of nuisance to enjoin discharges into Lake Champlain resulting in pollution in Vermont.[115] The Supreme Court first held that Vermont state nuisance law could not be used to enjoin the pollution. The Court was concerned that holding a New York source liable for violations of Vermont law would allow Vermont to override the permit requirements and policy choices made by the source state.[116] This was a problem under federal law, according to the Court, because the Act delegated to the EPA Administrator and the source state the authority to

111. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21–22 (1981).

112. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005); *see also* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 306–16 (2005) (summarizing the history of the Supreme Court's rejection of federal common law nuisance as it applies to interstate water pollution but noting the question remains open as to whether the Clean Air Act displaces federal common law on interstate air pollution).

113. *See* Farber & Frickey, *supra* note 67, at 891 (stating that *Ouellette* and *Middlesex County Sewerage Authority* "complete the story of interstate nuisance law").

114. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 481–82 (1987).

115. *Id.* at 483–84.

116. *Id.* at 495.

issue permits for discharges, and it was not for another state's common law to override the complex, technology-based standards these delegated authorities had considered.[117]

However, the Court went on to hold that the plaintiffs still had a remedy in the form of an action under the common law of the state in which the polluting source was located, in this case the law of New York.[118] The Court recognized that while the state in which a polluting source is located should have a strong voice in regulating its own pollution, the Clean Water Act nevertheless contemplates a role for states that share an interstate waterway with the source.[119] The Court also found that the savings clauses in the Clean Water Act negated displacement of all state causes of action.[120] Thus, the plaintiffs could pursue their nuisance claim under New York law based on that state's right to impose higher common law and statutory restrictions on sources within that state.[121] On remand, the district court held that not only could the plaintiffs' water-pollution claims go forward under New York's common law of nuisance, but their air-pollution claims for the same discharges could go forward on the same grounds.[122]

Since the *Ouellette* decision, state common law remains a potentially powerful tool to obtain injunctive relief and damages in actions for interstate and intrastate pollution. Indeed, after the plaintiffs continued to pursue their claims in the trial court under New York's nuisance law, the defendants paid a $5 million settlement and established a trust fund for environmental projects in the Lake Champlain area.[123] In the end, nothing in the Supreme Court's recent jurisprudence forecloses the ability of judges to rely on the principles expressed in *Moragne* to develop state common law in the environmental-protection area.

As discussed below, courts have not always used these principles to their full potential, instead tending to put up a wall between statutes and common law when it comes to resolving environmental disputes. At one time, this perhaps could be justified by the fact that the courts needed national statutory policy and specialized environmental agencies to obtain data, set standards, and regulate conduct in this new and complex area of the law. The field of environmental law is now over thirty years old, however, and courts are now in a better position than before to use those standards to

---

117. *Id.*

118. *Id.* at 497.

119. *Ouellette*, 479 U.S. at 490.

120. *Id.* at 492–93.

121. *Id.*

122. Ouellette v. Int'l Paper Co., 666 F. Supp. 58, 62 (D. Vt. 1987). The court noted that "state nuisance law has always been available to private parties to resolve interstate [nuisance] disputes . . . despite the development of federal common law for [use in actions] by states." *Id.* at 61.

123. PERCIVAL ET AL., *supra* note 35, at 100.

inform common law and provide remedies and relief not available under current statutory and regulatory law.

IV. ENVIRONMENTAL COMMON LAW, ENVIRONMENTAL REGULATION, AND THE NEW FEDERALISM

The distinction Justice Rehnquist drew in *Milwaukee II* between the role of federal and state common law can be placed in the broader debate over the "new federalism" that looms large in the treatment of constitutional law generally and environmental law specifically. The development of environmental law prior to its statutory beginnings in the 1970s provides an illustration of how state common law can evolve to address modern societal problems in this era of the "new federalism." Specifically, with the much-touted federal environmental statutes arguably at risk of losing some of their force as a result of challenges to congressional power under the Commerce Clause, there are good reasons to look at state common law as a player in the game of environmental protection. The sections that follow trace the development of environmental law from its beginnings in the common law of tort, to its federal statutory development, and to the current challenges to federal authority to protect environmental resources. This Part concludes that the time is ripe to reinvigorate state common law doctrines both to bolster federal environmental-protection efforts and to provide a safety net in the event future constitutional limits are placed on federal authority.

A. *RISE AND FALL: ENVIRONMENTAL COMMON LAW AND THE GROWTH OF THE REGULATORY STATE*

In the beginning, the story goes, environmental law was little more than tort law with an emphasis on nuisance law.[124] Attempts to enjoin or recover damages for pollution, noise, dust, and odor were brought as claims under the common law of nuisance, negligence, trespass, or strict liability.[125] As the nation became more industrialized, these disputes became more frequent

124. *See, e.g., id.* at 60 ("Prior to the explosion of environmental legislation in the 1970s, the common law was the legal system's primary vehicle for responding to environmental disputes."); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.1, at 112 (2d ed. 1994) ("To a surprising degree, the legal history of the environment has been written by nuisance law. There is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse."); Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 76 (2001) (stating that "prior to 1970, environmental protection law in the United States was essentially nonexistent" except for a few isolated state efforts and common law property and tort doctrines).

125. MADDEN & BOSTON, *supra* note 86, at 4–5 (stating that environmental tort actions are frequently pleaded with multiple theories of recovery, namely negligence, strict liability for abnormally dangerous activities, trespass, and nuisance); RODGERS, *supra* note 124, § 2.1, at 112 ("The impact of technology on humans has contributed in no small way to doctrinal developments in nuisance, trespass, negligence, and strict liability for abnormally dangerous activities.").

and more complicated. Still, it was not until the 1970s that Congress made any significant effort to build on existing common law tort remedies and provide a federal statutory system for regulating conduct that affects the environment.[126] Significantly, it is a myth that there was no affirmative regulation of the environment prior to the beginning of federal congressional involvement in the 1970s.[127] States and cities began regulating air and water pollution as early as the late 1880s, and, by the 1970s, eighty-four cities, eighty-one counties, and all fifty states had some form of air-pollution regulation, some of which were quite successful.[128] Moreover, states relied heavily on the judicial system to deal with interstate pollution problems even prior to the *Milwaukee v. Illinois* litigation in the 1970s.

Indeed, state and federal courts played a significant role in creatively using tort law to deal with the increasingly complex problems of an industrialized society. Some courts in the late eighteenth and early nineteenth centuries used the doctrines of nuisance, trespass, and strict liability to enjoin profitable industrial activities in order to protect the environment and the rights of farmers and residents to be free from pollution.[129] For instance, the Maryland Supreme Court in 1890 enjoined a fertilizer factory from emitting noxious vapors that were damaging the health and property of a nearby family.[130] Likewise, the New York Court of Appeals in 1913 enjoined a paper mill's operations from polluting a stream

126. *See* PERCIVAL ET AL., *supra* note 35, at 88 (describing the time period from 1970 to 1980 as containing an "explosion of federal legislation" and creating an era of "federal regulatory infrastructure"); E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 317–18 (1985) (describing the "extraordinary outburst" of pollution legislation "at the national level during the 1960s and 1970s" that "developed fairly suddenly, seemingly out of nowhere").

127. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578–79 (2001) ("[T]he view widely held in the legal literature that the states ignored environmental problems before 1970 is simply not correct."); *id.* at 579 (listing numerous states, cities, and counties with regulatory programs to control air pollution and citing statistics showing that the concentrations of important air pollutants were falling at significant rates).

128. *Id.* at 579–80 (citing statistics showing a more rapid decline of air-pollutant concentrations during state regulatory efforts than after the beginning of extensive federal regulation of air pollution). *But see* PERCIVAL ET AL., *supra* note 35, at 86 ("State laws and local ordinances to protect public health and to require the abatement or segregation of public nuisances were common, although they were poorly coordinated and rarely enforced in the absence of a professional civil service.").

129. *See, e.g.*, MADDEN & BOSTON, *supra* note 86, at 240–42 (discussing early cases granting injunctions against polluting activities).

130. Susquehanna Fertilizer Co. v. Malone, 20 A. 900, 902 (Md. 1890) (upholding a verdict for the plaintiff under nuisance theory and stating that "[n]o one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works, while the neighboring property is comparatively of little value").

used by farmers despite the economic benefits of the mill.[131] In 1904, a federal court in Utah enjoined a mine and smelter injuring nearby crops and animals.[132] Several decades later in the 1950s, the Oregon Supreme Court awarded $91,500 in damages for lost cattle and soil contamination as a result of fluoride emissions from a nearby aluminum plant.[133] Similarly, the North Carolina Supreme Court enjoined an oil refinery emitting gases and odors that interfered with a neighbor's property.[134] This equitable power is also reflected in the U.S. Supreme Court's 1907 decision in *Georgia v. Tennessee Copper Co.*,[135] where the Court used the doctrine of federal common law nuisance to enjoin a Tennessee mining company's noxious air emissions that were crossing state lines and affecting the State of Georgia's air, forests, crops, and orchards. Other courts, however, refused to enjoin economic activity to protect the environment and used their powers in equity to allow the polluting conduct to proceed in the name of progress.[136] Despite these different results, at the dawn of the age of federal environmental regulation in the 1970s, there was ample precedent for state and federal common law to remain a force in the growing effort to address modern-day pollution.[137]

Nevertheless, the environmental-law story generally claims that there has been little need for common law after 1970 as a result of the powerful environmental regulatory state that is better suited to deal with today's

131. Whalen v. Union Bag & Paper Co., 101 N.E. 805, 806 (N.Y. 1913) (enjoining plant's operations with an investment of $1 million in favor of plaintiffs' farms; noting the "destructive" nature of the waste from the mill to vegetable life, animal life, and water; and stating that "[a]lthough the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing the injunction").

132. McCleery v. Highland Boy Gold Mining Co., 140 F. 951, 952–53 (D. Utah 1904) (refusing to balance the value of the smelter and the value of the farms, and focusing on the individual rights of the farmers to be free from pollution).

133. Martin v. Reynolds Metals Co., 342 P.2d 790, 794 (Or. 1959) (stating that intrusion of particles constituted a trespass).

134. Morgan v. High Penn Oil Co., 77 S.E.2d 682, 690 (N.C. 1953).

135. Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).

136. *See, e.g.*, Losee v. Buchanan, 51 N.Y. 476, 484–85 (1873) (refusing to adopt the doctrine of strict liability for tort actions in the name of economic progress); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 666–67 (Tenn. 1904) (recognizing that the defendant's mining operation, which was the same facility involved in the *Georgia v. Tennessee Copper* decision cited *supra* note 135, was a nuisance to nearby residents who suffered from crop damage, timber damage, and ill health, but refusing to enjoin the activity for lack of better technology and because of its economic value). "We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization." *Losee*, 51 N.Y. at 484.

137. *See, e.g.*, Roger E. Meiners et al., *Burning Rivers, Common Law, and Institutional Choice for Water Quality*, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 54, 71 (Roger E. Meiners & Andrew P. Morriss eds., 2000) ("Common law environmentalism evolved across the states, provided a means for ordinary people to protect themselves from environmental harms, and became a key institutional player in the 'marketplace' for environmental rights.").

complex environmental issues.[138] While it is generally recognized that state *regulatory* efforts continue to play a major role in environmental protection (where state agencies can develop expertise), the same recognition often does not extend to state *common law*—beyond, perhaps, the ability to collect damages where federal law does not provide for such a remedy.[139]

The courts based this heavy focus on federal regulatory law in part on the premise that the federal government was in a better position to grapple with national environmental problems such as air pollution, water pollution, and soil and groundwater contamination because of better funding, resources, expertise, and data-collection capabilities.[140] Moreover, environmental statutes and regulations could provide broad, prospective solutions to environmental problems while common law was limited to deciding individual cases on a retrospective basis.[141] The idea that the federal government was in a better position in the 1970s to develop technical expertise, provide funding, and implement more uniform solutions to environmental problems is certainly true. The purpose of this Article is not to argue that federal environmental statutes should never have been enacted or that common law on its own is a preferable solution today to new statutory or regulatory initiatives and strong enforcement of existing

138. *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 777 (5th ed. 2002) ("That the law of nuisance has a place in environmental control seems clear, but there are a number of reasons to conclude that its contributions must be limited ones. . . . The general conclusion . . . is that nuisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems."); PERCIVAL ET AL., *supra* note 35, at 72 ("[T]here is wide agreement that private nuisance actions alone are grossly inadequate for resolving the more typical pollution problems faced by modern industrialized societies."); J.B. Ruhl, *Ecosystem Services and the Common Law of "The Fragile Land System,"* 20 NAT. RESOURCES & ENV'T, Fall 2005, at 3 (rejecting standard history of environmental law and concluding that legislative initiatives should look to common law for guidance, particularly for purposes of ecosystem management and ecosystem services).

139. *See, e.g.*, PERCIVAL ET AL., *supra* note 35, at 101 (noting that common law remains important for compensation purposes but that "[s]ome of the most innovative environmental protection measures are the product of state regulations").

140. *See Milwaukee II*, 451 U.S. 304, 325 (1981) (stating that complex problems of water pollution are inappropriate for federal common law and more appropriate for federal "administrative agencies possessing the necessary expertise"); PERCIVAL ET AL., *supra* note 35, at 66–67 (discussing plaintiffs' inability to prove causation as a limiting factor in using the common law to obtain relief for environmental harm); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 283 (3d ed. 2004) (citing various limitations of the common law in addressing environmental problems); Revesz, *supra* note 127, at 578 ("[T]he federal government is better suited than states to provide scientific information about the adverse health and environmental effects of various pollutants, because of the economies of scale in developing such information.").

141. *See, e.g.*, PLATER ET AL., *supra* note 140, at 283 (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991)).

environmental statutes.[142] Instead, the issue this Article explores is how state common law can be revived to fill its historic role as a gap-filler to address environmental-protection needs based in part on the policies in and data generated by environmental statutes and regulations. Indeed, the broad savings clauses in most federal statutes have left ample room for state common law to be a major player in environmental-protection efforts.[143]

The fact that common law has been seen as a sideline since the 1970s may be a function of two key judicial decisions that grappled with the continuing role for judge-made common law in the face of a growing body of statutory law. The first was the Supreme Court's decision in *Milwaukee II*,[144] which removed the federal common law of nuisance as a tool to address interstate water-pollution issues. Although the Court's later decision in *International Paper Co. v. Ouellette*[145] made clear that state common law was still available to address both intrastate and interstate air- and water-pollution issues, the shadow of *Milwaukee II* may have discouraged litigants

142. *See, e.g., id.* (stating that "many modern environmental problems are so complex and difficult to prove in the courtroom setting that common law cannot be relied upon to serve as society's primary environmental law strategy").

143. *See, e.g.*, Clean Water Act § 505(e), 33 U.S.C. § 1365(e) (2000) (including a savings clause); Clean Air Act § 304(e), 42 U.S.C. § 7604(e) (including a savings clause); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 302(d), 42 U.S.C. § 9652(d) (including a savings clause); *see also* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 497–500 (1987) (holding that the Federal Clean Water Act does not preempt state common law nuisance claims); Akzo Coatings v. Am. Renovating, 842 F. Supp. 267, 273 (E.D. Mich. 1993) (stating that CERCLA does not preempt state law remedies such as nuisance to recover property damage associated with hazardous-substance contamination); Terra-Products v. Kraft Gen. Foods, 653 N.E.2d 89, 94 (Ind. Ct. App. 1995) (holding that although evidence did not support recovery on the facts of the case, CERCLA's broad savings clause means that a defendant responsible for contaminating a plaintiff's property can be liable for diminution-of-property damages under state common law tort theories even after conducting remediation of plaintiff's property under CERCLA); Wash. Suburban Sanitary Comm'n v. CAE-Link Corp., 622 A.2d 745, 753–56 (Md. 1993) (explaining that emergency federal orders issued under the Federal Water Pollution Control Act and state law did not preempt the plaintiff's claims for nuisance and strict liability stemming from odors emanating from sewage sludge plant); Sharp v. 251st St. Landfill, Inc., 810 P.2d 1270, 1273–75 (Okla. 1991) (holding that state regulatory approval of a landfill does not preempt a common law nuisance claim to enjoin operation of the landfill based in part on savings clause of state pollution-control statute); Bradley v. Am. Smelting & Refining Co., 709 P.2d 782, 792–93 (Wash. 1995) (holding that Washington statute controlling air emissions does not preempt action in nuisance to recover damages in part based on savings clause of state statute); PERCIVAL ET AL., *supra* note 35, at 101 ("Even though the federal environmental laws often require states to meet minimum national standards, they generally do not preempt state law except in narrowly defined circumstances."); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 952 (1999) ("In general, the various federal statutes did not eliminate the right to bring common law actions; they created an alternative that is, in general, much easier to bring (and win).").

144. *Milwaukee II*, 451 U.S. at 331–32.

145. *Ouellette*, 479 U.S. at 499–500.

from using common law at all in favor of the possibilities provided by new federal statutes.

The second decision that may have influenced the marginalization of state common law despite the holding in *Ouellette* is the New York Court of Appeals' 1970 decision in *Boomer v. Atlantic Cement Co.*[146] In that case, the plaintiff homeowners sued the defendant cement plant under the state's common law of nuisance alleging that the plant's emission of dirt, smoke, and soot, as well as vibrations emanating from the plant, interfered with the use and enjoyment of their properties.[147] Thus, this was a wholly intrastate dispute that state common law governed.

In resolving the case, the New York Court of Appeals recognized that the plant's activities constituted a nuisance but refused to enjoin the plant's operations. In justifying its decision, the court focused on the inability of a common law court to address complex federal air-pollution problems that extended beyond the confines of the case before it. The court noted at the beginning of the opinion the public concern over air pollution and the growing responsibility of the state and federal governments to address it.[148] The court then questioned whether it was appropriate for private litigants seeking relief from a specific plant to turn their case into one that required resolution of "broad public objectives."[149] It noted that legislative and regulatory authorities were far from coming up with an adequate solution to the problem, and that necessary technical measures had not been developed and might not even be economically practical.[150]

The court further distanced itself from being a part of any solution by stating that controlling air pollution will depend on significant technical resources, on a balance between the economic impact of regulation and public health, and will likely require significant public expenditure beyond that of any local community.[151] The court then held that damages would compensate the plaintiffs and be adequate to encourage the defendant to conduct research to improve its technology and minimize the nuisance.[152]

The significance of the New York court's decision is less a function of its holding (the plaintiffs at least received compensatory damages) than of its

146. Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970).

147. *Id.* at 871. In contrast to the *Milwaukee* cases, the plaintiffs' claim in *Boomer* was under principles of private nuisance, not public nuisance. For a discussion of the standards for public nuisance and private nuisance and the difference between the two, see generally Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359 (1990) (arguing that *Boomer* may have added to the lack of understanding of the law of public nuisance because it failed to distinguish between the two causes of action); *supra* note 86.

148. *Boomer*, 257 N.E.2d at 871.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 873.

analysis. In rejecting the request for an injunction, the court minimized the potential role it could play in both spurring innovation and addressing the immediate impact of pollution on state residents. This was not a case where the court needed to be concerned with enjoining the operations of an out-of-state plant.[153] Instead, the plaintiffs simply asked the court to balance the equities between two sets of in-state interests and reach a result that the court was clearly empowered to reach under its equitable authority and state common law.[154]

Indeed, a strong dissent in *Boomer* made precisely this argument. In his dissent, Judge Jasen recognized that the significant national and state problem of air pollution and the state and federal statutes expressing a policy to prevent air pollution were precisely the reasons why an injunction *was* appropriate in the case.[155] In concluding that the health and environmental problems that the plant was causing warranted an injunction, Jasen stated that his intent was not to close the plant but to recognize the urgency of the problem and allow the company a certain period of time to develop a solution.[156] Finally, he warned that "[i]n a day when there is growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors."[157] Thus, Jasen correctly viewed the common law as fully capable of working in tandem with legislative efforts to control pollution.

Also in the 1970s, the Court of Appeals for the Seventh Circuit expressed a vision similar to one expressed by the dissent in *Boomer* regarding the role of state common law in this new era of environmental awareness. In *Harrison v. Indiana Auto Shredders Co.*,[158] a case decided just a few years before *Milwaukee II*, the court considered an action to enjoin an auto-shredder company's operations on state nuisance grounds. Although the court found the lower court's injunction closing the facility in error, its language on the role of state common law showed a recognition of both the power and necessity for continued judicial involvement in environmental-protection efforts. The court stated that the case was part of a "new breed"

153. Even if it had, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), later confirmed that this could be accomplished using the source state's common law. *See supra* notes 118–21 and accompanying text.

154. *See* Farber & Frickey, *supra* note 67, at 890 n.59 (noting that the court in *Boomer* retreated from "the traditional policymaking role of the courts" and that, in fashioning an appropriate equitable remedy, courts historically have considered the broad public interest in addition to the private interests of the parties to the suit (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 65 (1973); Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531, 565 (1988))).

155. *Boomer*, 257 N.E.2d at 875 (Jasen, J., dissenting).

156. *Id.* at 877.

157. *Id.*

158. Harrison v. Ind. Auto Shredders Co., 528 F.2d 1107 (7th Cir. 1976).

of lawsuit created by the "growing concern for cleaner air and water."[159] The court recognized that the growth of environmental litigation has forced the courts into "difficult situations where modern hybrids of the traditional concepts of nuisance law and equity must be fashioned."[160] Despite these difficulties, the court declared that "environmental consciousness may be the saving prescript for our age," and that the right of injured parties to obtain relief in the courts "serves as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside."[161]

The court noted the difficulties of judicial involvement in "environmental balancing" but concluded that there must be a forum for aggrieved parties and the courts are "qualified to perform the task."[162] The court also explained that, unlike legislatures, courts are skilled at balancing equities, are insulated from lobbying from industrial polluters, and often are in a better position to judge the effect of a pollution nuisance upon a locality because of their physical proximity to the individual problem.[163]

This physical proximity is particularly important in nuisance cases, where the court must determine whether the defendant's invasion of the plaintiff's interest is "unreasonable" based on weighing the gravity of the harm against the utility of the defendant's action.[164] The court assesses the "gravity of the harm" based on the extent, character, social value, and local suitability of the plaintiff's land use.[165] In turn, the court assesses the "utility" of the defendant's conduct based on the social value of the defendant's conduct, whether it is suitable to the character of the locality, and the impracticability of preventing or avoiding the invasion.[166] As a result, the Seventh Circuit's observation that judges are in a good position to conduct this type of localized, fact-intensive balancing makes sense.

These two competing visions of the role of state common law (the *Boomer* majority on the one hand and the *Boomer* dissent and *Harrison* on the

159. *Id.* at 1120.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Harrison*, 528 F.2d at 1120. One might argue, however, that judges are less free today from political pressures because of recent judicial decisions allowing judges to obtain party endorsements and take positions on political issues when running for judicial office. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding a state canon of judicial conduct that prohibited candidates for judicial election from expressing views on disputed legal or political issues violated the First Amendment); Republican Party of Minn. v. White, 416 F.3d 738, 766 (8th Cir. 2005) (holding on remand that a state canon of judicial conduct that prohibited candidates for judicial election from soliciting contributions and attending political gatherings violated the First Amendment).

164. RESTATEMENT (SECOND) OF TORTS § 826 (1979).

165. *Id.* § 827.

166. *Id.* § 828.

other) at the beginning of the modern environmental era show courts struggling with their policymaking role during a critical time in the development of statutory environmental law. The *Boomer* and *Harrison* courts issued their decisions in the 1970s, just at the dawn of the explosion of environmental statutes and the creation of the Environmental Protection Agency ("EPA"). In fact, President Nixon signed the Clean Air Act Amendments of 1970 only a few months after the *Boomer* decision.[167] In the next decade, Congress enacted significant new laws addressing water pollution, pesticides, solid and hazardous waste, hazardous-substance contamination, and control of toxic substances.[168] Notably, *Boomer* marked the beginning of a major decline in the use of state common law to achieve major pollution-prevention goals, which lasted from 1970 until very recently.[169] Indeed, a 1998 study of reported pollution-related cases from 1945 through 1994 found that the number of common law actions to address environmental harm declined markedly beginning in 1975, and those cases that did address state common law claims were more often decided in federal court rather than state court.[170]

Boomer came not only at a significant point in the development of statutory law, but also at what could have been a significant point in the development of common law. Just three months after *Boomer*, in June 1970, the Supreme Court issued its admiralty law decision in *Moragne*, discussed earlier in Part III.A.[171] *Moragne* presented a very different vision than *Boomer* of the role of common law in areas where statutes govern some, but not all, of the legal landscape. In essence, *Moragne* stood for the idea, expressed by the dissent in *Boomer*, that broad statutory policy should be used to develop common law in order to remedy environmental harms presented to the courts. Thus, in the scope of one year, two decisions, one state and one federal, offered opposite prescriptions for how courts should use their common law power when faced with the shadow of statutes.

---

167. MADDEN & BOSTON, *supra* note 86, at 253.

168. *See* PERCIVAL ET AL., *supra* note 35, at 88–90 (providing a chronology of significant federal environmental legislation).

169. MADDEN & BOSTON, *supra* note 86, at 253 (stating that in the thirty years since *Boomer* was decided, very few cases have addressed the issue of solving major pollution problems through injunctions and damages, and attributing that lack of cases to the overhaul of the Clean Air Act in 1970 and a comprehensive rulemaking structure); *see also* Meiners & Yandle, *supra* note 143, at 944 ("Since regulations have come to dominate air pollution law, few common law cases have been litigated in recent years."). For recent efforts to use the common law for major pollution-prevention efforts, see *infra* Part V.B.

170. H. Marlow Green, *Can the Common Law Survive in the Modern Statutory Environment?*, 8 CORNELL J.L. & PUB. POL'Y 89, 109 (1998). As a result of this trend, state courts are unable to develop their own common law. Instead, traditional state common law claims such as nuisance and trespass are add-ons to claims brought in federal court pursuant to the various federal environmental statutes and likely receive less attention than they would in state court. *Id.* at 108.

171. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); *see supra* Part III.A.

Although *Boomer* is a state case, its influence extended far beyond New York state boundaries, quickly becoming an "established part of the legal canon," subject to significant scholarly treatment and inclusion in most Property, Torts, Environmental Law, and Remedies textbooks.[172] According to environmental- and constitutional-law scholar Daniel Farber, *Boomer*'s fame and continued use as a teaching tool is due to its appealing "drama," its apparent factual simplicity, its effort to achieve pragmatic fairness, and its timing; decided at the beginning of both the environmental movement and the law-and-economics movement, it became a paradigm case for both fields.[173] It is quite possible that, because the case is so well known, it influenced not only other courts (including courts outside New York), but also lawyers and litigants deciding whether or not to spend significant resources to pursue similar claims.[174] To the extent that this influence existed, the *Boomer* court's decision to stand aside to let Congress and state legislatures grapple alone with major policy issues sent a strong message that minimized the role of state common law in the growing field of environmental law.[175]

However, as Farber has stated, we effectively came "full circle" during those years from *Milwaukee I* ("preempting state law in favor of the federal common law"), *Milwaukee II* ("preempt[ing the] federal common law"), and

---

172. *See, e.g.*, Daniel A. Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law, in* PROPERTY LAW AND LEGAL EDUCATION 7 (Peter Hay & Michael H. Hoeflich eds., 1988); Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 113 (2005) [hereinafter Farber, *The Story of* Boomer] ("[*Boomer*] has become an established part of the legal canon. It looms large, not just in environmental law, but also in property, remedies, and torts."); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219, 226–29 (1978); *see also* Abrams & Washington, *supra* note 147, at 399.

173. Farber, *The Story of* Boomer, *supra* note 172, at 148.

174. While there may be no direct data showing a cause-and-effect relationship between the *Boomer* decision and the decline of nuisance lawsuits, the existence and notoriety of the case may be at least one factor resulting in the decline in the number of common law claims in state courts to address environmental concerns. *See supra* notes 169–70 and accompanying text.

175. *See* DUKEMINIER & KRIER, *supra* note 138, at 777 (detailing the shortcomings of nuisance suits and stating that judges show a reluctance to use nuisance "as the means for an ambitious program of environmental control"); PERCIVAL ET AL., *supra* note 35, at 88–90 (providing a chronology of significant federal environmental legislation including the National Environmental Policy Act and Clean Air Act Amendments of 1970; the Federal Water Pollution Control Act (Clean Water Act) in 1972 and its significant amendments in 1977 and 1987; the Endangered Species Act in 1973; the Safe Drinking Water Act in 1974; the Toxic Substances Control Act of 1976; the Resource Conservation and Recovery Act of 1976; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980; and the Emergency Planning and Right-to-Know Act of 1986); Meiners & Yandle, *supra* note 143, at 944 (noting that "[s]ince regulations have come to dominate air pollution laws, few common law cases have been litigated in recent years"); Andrew P. Morriss, *Lessons for Environmental Law from the American Codification Debate, in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW, *supra* note 137, at 130, 151–52 ("Environmental law today is primarily an exercise in statutory and regulatory interpretation, and the common law has been already largely crowded out of environmental law.").

Ouellette ("reinstat[ing] state law").[176] As a result, *Ouellette* lays the groundwork for a different vision than that expressed in *Boomer* and provides a strong basis for states and their citizens to use their common law, in addition to statutory and regulatory efforts, to increase environmental protection.

Moreover, in the years since these cases were decided in the 1970s and 1980s, the legal landscape has changed significantly in favor of state common law.[177] First, as discussed in the next section, the "new federalism" movement has called into question the ability of the federal government to control environmental pollution through broad statutory mandates. Second, the vast amounts of data, technology, and expertise available in the market as a result of federal statutory and regulatory development provide tools for courts to shape the common law while minimizing the competency concerns expressed by the court in *Boomer*. These issues are discussed below.

B. THE NEW FEDERALISM AND ITS IMPACT ON ENVIRONMENTAL LAW

The U.S. Constitution is based on a compromise between those founders who supported a strong national government and those who wished to preserve individual state autonomy.[178] Thus, the structure of the Constitution creates a system of "dual sovereignty" giving power to both the federal government and the states.[179] While this system of federalism has always been fundamental to our governmental structure, it has taken on increasing significance since the 1990s as the Rehnquist Court used principles of federalism to cut back on federal congressional authority in favor of state autonomy. As explained below, this narrowing of federal statutory authority may put at risk many of the broad federal environmental statutes upon which we have come to rely. This potential narrowing of federal legislative authority provides the opportunity for litigants and lawyers to lay the groundwork for courts to develop state common law to address current environmental issues based on the policies and standards in existing federal and state environmental statutes.

---

176. Farber, *The Story of* Boomer, *supra* note 172, at 146.

177. One caveat to this trend, of course, is the Bush administration's recent, aggressive push for more federal preemption of common law tort claims against the pesticide and pharmaceutical industries, among others. *See infra* notes 293–95 and accompanying text.

178. *See, e.g.*, ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES AND THE FEDERAL GOVERNMENT 82–83 (1992) (describing the development of American federalism); JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 14–54 (1992) (tracing the establishment of the federal system and Constitution); Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 114–16 (1996) (same).

179. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

One of the broadest of Congress's enumerated powers in the U.S. Constitution is the power to regulate interstate commerce.[180] Under this authority, from the time of the New Deal until the 1990s, the Supreme Court approved far-reaching federal legislation governing housing, labor, racial discrimination, and the environment, based on the principle that seemingly local activities had a "substantial effect" or "cumulative effect" on interstate commerce.[181]

It was not until the 1990s that the Court began an effort to rein in Congress's power in a series of cases that had a significant impact on the balance of power between the federal and state governments. In 1995, in *United States v. Lopez*,[182] and in 2000, in *United States v. Morrison*,[183] the Court struck down for the first time in nearly sixty years two federal statutes as beyond Congress's authority under the Commerce Clause. *Lopez* involved a federal statute imposing criminal sanctions for possessing guns within a certain distance from schools, and *Morrison* involved a federal statute imposing criminal sanctions for domestic violence. In these cases, the Court held that the laws in question regulated wholly intrastate activity and thus did not regulate interstate commerce.[184]

The Court's decisions in *Lopez* and *Morrison* have led to a host of challenges to many of the environmental statutes Congress enacted under its Commerce Clause authority in the 1970s and 1980s, such as the Clean Air

180. *See* U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power to regulate commerce "among the several states"); TRIBE, *supra* note 15, at 807–08 (stating that "[t]he Commerce Clause is . . . the chief source of congressional regulatory power").

181. *See* United States v. Lopez, 514 U.S. 549, 556 (1995) (noting that cases decided in the 1930s and 1940s "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause"); TRIBE, *supra* note 15, at 811–15 (citing the development of expanded authority for Congress under the Commerce Clause as a result of Supreme Court decisions in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (holding that Congress can regulate labor relationships at an integrated manufacturing plant because of the effect on interstate commerce); *United States v. Darby*, 312 U.S. 100, 113–15 (1941) (upholding the wage and hour provisions of the Fair Labor Standards Act even where the activity took place wholly intrastate because of the impact on other states); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (holding that Congress can control farmers' wheat production for home consumption because supply and demand cumulatively impact price and markets); and *Katzenbach v. McClung*, 379 U.S. 294, 301–05 (1964) (upholding enforcement of a federal law prohibiting racial discrimination against a small restaurant on grounds that the combined effect of all segregated restaurants inhibits the sale of goods and obstructs travel)); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 390 (2005) ("For most of the latter half of the twentieth century, the notion that there were justiciable limits on the scope of Congress's Commerce Clause power was a dead letter."); Steinzor, *supra* note 178, at 116–17 (describing the proliferation of federal power and programs from the time of the Great Depression and the New Deal).

182. *Lopez*, 514 U.S. 549.

183. United States v. Morrison, 529 U.S. 598 (2000).

184. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

Act,[185] the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[186] the Endangered Species Act,[187] and the Clean Water Act.[188] While the federal appellate courts have generally rejected these challenges, many of the decisions have been subject to strong dissents.[189] Moreover, although the Supreme Court has avoided constitutional review of these decisions, the Court will likely address the constitutionality of one or more of these federal laws in the near future as challenges continue.

The Court has come close to addressing these issues in two recent Clean Water Act cases. In *Solid Waste Agency v. Army Corps of Engineers* ("*SWANCC*"),[190] the Court was called upon in 2001 to determine whether the Army Corps could assert federal jurisdiction under the Clean Water Act over intrastate, isolated wetlands solely on the grounds that the wetlands provided a habitat for migratory birds.[191] The Court invalidated the Army Corps regulation at issue on grounds that the statute itself did not provide for jurisdiction over such wetlands, and thus did not reach the constitutional issue.[192] However, the Court stated that if the statute was interpreted to allow for such jurisdiction, the interpretation might raise "serious constitutional problems."[193]

---

185. 42 U.S.C. §§ 7401–7671q (2000).

186. *Id.* §§ 9601–9675.

187. 16 U.S.C. §§ 1531–1544 (2000).

188. 33 U.S.C. §§ 1251–1387 (2000).

189. *See, e.g.*, Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 81–83 (D.C. Cir. 2001) (rejecting a Commerce Clause challenge to the application of the Clean Air Act limiting the content of VOCs in architectural coatings); United States v. Olin Corp., 107 F.3d 1506, 1511 (11th Cir. 1997) (rejecting a Commerce Clause challenge to the application of CERCLA to local waste-disposal activity); Frier v. Westinghouse Elec. Corp., 303 F.3d 176, 203 (2d Cir. 2002) (rejecting a Commerce Clause challenge to the application of CERCLA limitations period to state law claims involving damages resulting from the release of hazardous substances); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997) (rejecting a Commerce Clause challenge to the application of the Endangered Species Act to a fly found only in a portion of California); Gibbs v. Babbitt, 214 F.3d 483, 486–87 (4th Cir. 2000) (rejecting a Commerce Clause challenge to the application of the Endangered Species Act to the taking of red wolves on private property); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 624 (5th Cir. 2003) (rejecting a Commerce Clause challenge to the application of the Endangered Species Act to a Texas cave spider); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1072–73 (D.C. Cir. 2003) (rejecting a Commerce Clause challenge to the application of the Endangered Species Act to the arroyo toad); United States v. Deaton, 332 F.3d 698, 708 (4th Cir. 2003) (rejecting a Commerce Clause challenge to the application of the Clean Water Act to wetlands adjacent to navigable waters); *see also* Adler, *supra* note 181, at 404–06 (discussing the current wave of Commerce Clause challenges to federal environmental statutes).

190. Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159 (2001).

191. *Id.* at 162.

192. *Id.*

193. *Id.* at 173. *But see id.* at 192–93 (Stevens, J., dissenting) (arguing that Army Corps' power over wetlands that serve as a habitat for migratory birds is well within Commerce Clause boundaries and Congress intended to extend jurisdiction to those boundaries in the Clean Water Act).

More recently, in *Rapanos v. United States*,[194] the Court in 2006 addressed whether the term "navigable waters" under the Clean Water Act included wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters.[195] Like in *SWANCC*, Justice Scalia's plurality opinion in *Rapanos* interpreted the Clean Water Act in a manner that did not decide the constitutional issue, but again warned that a broader reading of "navigable waters" would "stretch the limits of Congress's commerce power."[196]

The Court's current willingness to scrutinize federal regulation of seemingly local activities—as shown in the *Lopez* and *Morrison* cases discussed earlier—poses more than a minimal threat to federal authority over environmental resources such as intrastate wetlands, endangered species that do not regularly cross state lines, and individual parcels of land that are subject to soil or groundwater contamination.[197] While it is too soon to know just how far the Court will go in reining in federal authority to regulate natural resources and pollution on Commerce Clause or other grounds in future cases, the current trends and warning signs argue for a renewed emphasis on state law to address pollution and natural-resources concerns in the coming years.[198]

V. REDISCOVERING STATE COMMON LAW WITH THE HELP OF FEDERALISM, STATUTORY STANDARDS, AND REGULATORY DATA

Today, there is significant public concern over the failure of the federal executive and legislative branches to address modern environmental concerns such as global warming, air pollution, water pollution, and

194. Rapanos v. United States, 126 S. Ct. 2208 (2006).

195. *Id.* at 2219.

196. *Id.* at 2212. *But see id.* at 2249 (Kennedy, J., concurring) (proposing an alternate interpretation of "navigable waters" and stating that such an interpretation is consistent with the Commerce Clause); *id.* at 2261–62 (Stevens, J., dissenting) (stating there is no constitutional reason why Congress cannot extend jurisdiction to adjacent wetlands that play an important role within the watershed).

197. *But see* Gonzales v. Raich, 545 U.S. 1, 6–9 (2005) (holding that application of a federal drug law criminalizing the manufacture, distribution, or possession of marijuana in California did not violate the Commerce Clause despite valid California law allowing such activities for medicinal purposes); Michael C. Blumm & George A. Kimbrell, Gonzales v. Raich, *the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 497 (2005) (stating that the Court's decision in *Raich* signals that the federalism "revolution" is not as radical as feared and that *Raich* should put an end to judicial attacks on the Endangered Species Act).

198. This judicial trend toward devolving power from the federal government to state governments contrasts with recent federal efforts by the executive branch and certain members of Congress to use federal law to preempt efforts by injured parties to recover damages associated with pesticides, prescription drugs, and other products under state tort law. *See infra* notes 293–95 and accompanying text.

regulation of toxic substances.[199] In response, many state and local governments have taken matters into their own hands to attempt to fill this perceived regulatory and enforcement void.[200] The lack of federal action and the rise of more aggressive state action, coupled with the new federalism, present the perfect opportunity to consider the potential role of state common law in new environmental-protection efforts. Although we may have missed the opportunity to examine common law options in the rush to fix all our environmental problems through federal statutes and regulations, "there is no reason why the periodic and seemingly endless attempts to redesign those statutes should not include consideration of common law alternatives as well."[201] Efforts to make renewed use of state common law augmented by statutory policy and data created over the past thirty years can be justified not only to increase environmental protection, but also to provide a closer connection and more consistency between statutory and common law in a field that has always been a function of both statutes and common law.

Moreover, there has always been a close and complementary relationship between federal law and state law in the area of environmental protection. Indeed, from the beginning, Congress has been careful to ensure a continued role for state law in environmental-protection efforts through the cooperative-federalism model and broad savings clauses to preserve the ability of states via their common law and statutory law to enact higher standards than imposed by federal law.[202] However, most scholarly discussion of the federal-state relationship in environmental law has focused on state statutory and regulatory environmental-protection efforts, with little focus on the role of state common law in the federal-state balance.[203]

---

199. *See, e.g.*, Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 749 n.280 (2006) (citing authorities); Marty Coyne, *Enforcement: Polluters Have Benefited from Lax EPA Enforcement*, [10 FEDERAL AGENCIES] GREENWIRE (ENVTL. AND ENERGY PUBLISHING, LLC) (Oct. 13, 2004) (stating that EPA's use of lawsuits to address violations of the Clean Air Act, Clean Water Act, and other laws dropped seventy-five percent between the last three years of the Clinton administration and the first three years of the Bush administration).

200. *See, e.g.*, Klass, *supra* note 199, at 750 n.281 (citing authorities); Carolyn Whetzel, *California Legislature Approves Measure to Reduce Greenhouse Gases Statewide*, DAILY ENVTL. REP. (BNA) No. 170 (Sept. 1, 2006) (reporting on an agreement between the California Governor and Legislature to require significant cuts in greenhouse-gas emissions within the state and lack of national policy on the issue).

201. Morriss, *supra* note 175, at 162; *see also id.* at 154 (arguing that common law judges are more insulated from interest groups and not subject to agency capture).

202. *See, e.g.*, PERCIVAL ET AL., *supra* note 35, at 101–02 (discussing the cooperative-federalism model and rare use of federal preemption in environmental law); *see also supra* note 143 (detailing savings clauses in various federal statutes and caselaw confirming the lack of federal preemption of state environmental law in various circumstances).

203. *See, e.g.*, Hodas, *supra* note 200, at 53–57 (discussing state and local regulatory efforts to address global warming); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to the Critics*, 82 MINN. L. REV. 535, 538–40 (1997) (rejecting the premise

A federal approach to environmental regulation was originally justified, in part, by concerns that states would engage in a race to the bottom to attract business through lessening environmental regulations within their borders.[204] While there has been much scholarly debate regarding the validity of those concerns,[205] that dispute is not the focus of this Article. Regardless of whether the original federal effort was necessary, the fact remains that in many areas of environmental protection, it is the federal government that has come under fire for failing to protect the environment, and it is the states that are taking the lead in new environmental-protection efforts.[206] In addition, the Supreme Court's new federalism revolution has called into question Congress's ability under the Constitution to protect the environment.[207] Thus, there has been a recent and significant shift from the federal government to the state government as the source of new leadership in efforts to come up with innovative solutions to modern environmental problems.

Indeed, the states recently have been particularly active in efforts to enact programs and regulations to address air pollution, water pollution, toxic substances, right-to-know laws, remediation of contaminated property, auto-emission standards, hazardous and solid waste, and environmental

---

that states will engage in a race to the bottom if national pollution-control standards are absent and arguing that states can address many pollution issues on a state regulatory level). *See generally* ENVIRONMENTAL FEDERALISM (Terry L. Anderson & Peter J. Hill eds., 1997) (addressing, in part, state and federal roles in regulating public lands, state lands, wildlife conservation, water rights, and pollution).

204. *See* PERCIVAL ET AL., *supra* note 35, at 101–03. Other justifications include the federal government's superior resources and expertise and heightened ability to address national, interstate, and global issues. *See supra* notes 140–41 and accompanying text.

205. *See, e.g.*, Adler, *supra* note 181, at 464–65 (arguing that federal environmental programs often discourage or obstruct state reforms and that state and local governments are at the forefront today of developing new environmental solutions); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom?,"* 48 HASTINGS L.J. 271, 271 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 570 (1996); Revesz, *supra* note 127, at 558 (arguing that states are taking the lead on new environmental initiatives); Revesz, *supra* note 203, at 535 (arguing that states can regulate pollution better than the federal government); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992). *See generally* Steinzor, *supra* note 178.

206. *See* Hodas, *supra* note 200, at 53–57 (discussing state and local efforts to address global warming); Revesz, *supra* note 127, at 558 (concluding that states have taken the lead since the 1990s in attacking important environmental problems by enacting regulations governing automobile-emissions standards, hazardous waste, municipal solid waste, environmental-impact statements, and duty to warn, while the federal government has enacted few significant pieces of legislation.); *id.* at 630–31 (comparing state efforts and federal efforts); *see also supra* notes 199–200 and accompanying text (describing criticism of the federal administration for failure to protect the environment and state initiatives).

207. *See supra* Part IV.B.

review.[208] Today's focus on the states' renewed efforts similarly has centered primarily on state statutory and regulatory initiatives rather than on state common law. Less discussion has focused on the extent to which state common law can take advantage of the wealth of federal and state environmental standards and data to play a significant role in protecting the environment.[209]

Common law has significant benefits that are often ignored in the blind reliance on statutory and regulatory solutions. The common law can evolve in a reasoned manner, generally insulated from interest groups, and reach decisions based on sworn, scientific, and focused testimony rather than the generalities and anecdotes often present in congressional hearings.[210] Moreover, local courts (whether state or federal) are often in a better position to judge the effects of pollution in individual cases given their proximity to the problem.[211] Thus, while congressional action is necessary for strong, sweeping policy directives, common law can play a significant role in ensuring that policy statements are used to shape appropriate remedies in

208. *See, e.g.*, Michael Bologna, *Governor Unveils Plan to Reduce Mercury from Coal-Fired Power Plants by 90 Percent*, 37 ENV'T REP. 91, 91 (2006) (reporting on the Illinois Governor's state mercury-reduction plan that would force coal-fired power plants to cut toxic emissions far below federal targets because "[t]he new federal mercury regulations don't go far enough in protecting the public from what we know are very dangerous emissions"); Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 65–68 (2005) (discussing local and state regulatory initiatives to address global warming in the face of federal inaction); Revesz, *supra* note 127, at 583–614 (discussing various state regulatory initiatives); Dean Scott, *Administration to Focus on Voluntary Efforts as More States Move to Regulate Emissions*, 37 ENV'T REP. S-11, S-11–S-16 (2006) (reporting that the federal administration is continuing to advance voluntary initiatives as the best way to address climate change in 2006, but California and several other states are moving ahead on their own to set mandatory emission caps despite federal opposition and litigation by industry).

209. *See supra* note 203 and accompanying text. Some recent work that has focused on common law efforts, as opposed to statutory and regulatory efforts, includes Thomas O. McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 371 (2005) (using the example of tort litigation initiated by various states to address MTBE contamination in groundwater to argue that tort litigation is an important tool in correcting a regulatory system controlled by special interests); Meiners & Yandle, *supra* note 143 (arguing that common law coupled with state-level controls could have done a much better job to protect the environment than the federal regulatory system); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005) (discussing the use of lawsuits by state attorneys general to address carbon-dioxide emissions and global warming); James A. Sevinsky, *Public Nuisance: A Common Law Remedy Among the Statutes*, NAT. RESOURCES & ENV'T, Summer 1990, at 29, 59 (arguing that, as we entered the 1990s, common law principles, if innovatively applied, would continue to provide remedies for environmental harms).

210. *See* CALABRESI, *supra* note 1, at 5 (discussing arguments in favor of common law benefits); Meiners et al., *supra* note 137, at 142–43, 154. As recognized at *supra* note 163, as state judicial elections become more politicized, judges are arguably less insulated from lobbying and political pressures than they might have been at the time Calabresi published his book.

211. *See* Harrison v. Ind. Auto Shredders Co., 528 F.2d 1107, 1121 (7th Cir. 1976) (describing benefits of common law).

areas not covered by statute.[212] The common law certainly has shortcomings; it is retrospective, develops slowly and in a nonuniform manner across jurisdictions, and thus can rarely provide comprehensive solutions to pressing national problems.[213] Nevertheless, although these shortcomings highlight the continuing need for statutory and regulatory reform and for the strong enforcement of existing laws, they in no way negate the common law's ability to make a real contribution to today's environmental problems.

On a more practical level, common law provides for compensatory damages, punitive damages, and injunctive relief. By contrast, most federal environmental statutes do not provide for compensatory or punitive damages, and some federal statutes do not even provide for state or private-party injunctive relief.[214] Moreover, although the Clean Water Act and the Clean Air Act provide a federal-permit shield, which prevents most federal enforcement under those laws against parties in compliance with the terms of their permits, in many jurisdictions a state common law nuisance action is available even if the party is in compliance with a state or federal permit.[215]

---

212. As Calabresi pointed out, if common law courts move the law in a direction the majority does not favor, Congress or the various state legislatures have always had the power simply to address the issue directly through legislative action. *See* CALABRESI, *supra* note 1, at 4.

213. *See* PLATER ET AL., *supra* note 140, at 283–84.

214. *See, e.g.*, 33 U.S.C. § 1365 (2000) (allowing citizen suits under the Clean Water Act for assessment of civil penalties or imposition of injunctive relief for violation of effluent standards or limitations, but no right to seek compensatory damages); 42 U.S.C. § 9607 (2000) (providing for the recovery of response costs but not for injunctive relief or compensatory damages for releases of hazardous substances); *id.* § 7604 (providing right of action to seek civil penalties and injunctive relief for violation of Clean Air Act statutory provisions, but no right to seek compensatory damages); *see also* Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (confirming that there is no private right of action under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136a–136y (2000), but holding that FIFRA does not preempt state common law claims that do not challenge the pesticide label). As an example of limitations on state actions, CERCLA does not provide states with the authority to seek an injunction to force a responsible private party to remediate a hazardous-waste site even if there is an imminent threat to human health and the environment. Instead, that authority is limited to the federal government. As a result, a state seeking to force a cleanup must resort to the common law of nuisance to obtain injunctive relief. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1049–52 (2d Cir. 1985) (holding that "injunctive relief under CERCLA [was] not available to the state," but that an injunction could issue against the defendant under New York public nuisance law); *see also* PLATER ET AL., *supra* note 140, at 165–75 (discussing equitable relief, compensatory damages, and punitive damages available for environmental harms under the common law); Farber, *The Story of* Boomer, *supra* note 172, at 146–47 (noting that the Clean Water Act does not allow pollution victims to recover damages and that nuisance actions remain available to recover such damages); Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 905 (2004) (noting that common law claims are necessary to recover for property damage, personal injury, and punitive damages for actions contaminating soil and groundwater).

215. Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981) (holding that a chemical-waste-disposal site could be a nuisance despite existence of operating permits from a state environmental agency); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW §§ 2.11–2.12 (1986 & Supp. 2005) (discussing the impact of state and federal statutes on common law

The goal of this Article, however, is not to argue only that we should place more emphasis on state common law, but also to investigate to what extent state common law courts can use federal and state statutes, regulations, and scientific developments since the 1970s to strengthen common law as a means of environmental protection. The following sections provide a review of the caselaw to date and possibilities for its further advancement.

A. *JUDICIAL EFFORTS TO USE* MORAGNE *PRINCIPLES IN DEVELOPING STATE COMMON LAW FOR ENVIRONMENTAL-PROTECTION PURPOSES*

This Section reviews caselaw from 1970 through the present to determine the extent to which courts are utilizing statutes, regulations, and improved scientific expertise on environmental issues to use common law for environmental-protection purposes. To the extent courts are doing so, they are following in the tradition begun by Holmes, Pound, Landis, Cardozo, and others, and expressed by the Supreme Court in *Moragne.*

1. Judicial Use of Statutory and Regulatory Policy to Advance State Common Law

Since the explosion of federal and state environmental statutes began in the 1970s, courts have used a growing number of statutory and regulatory standards to develop their state environmental common law of tort on issues of liability, damages, and injunctive relief. First, courts have increasingly relied on statutory and regulatory standards to find liability under the doctrines of negligence per se, nuisance, and strict liability. In fact, the proposed final draft of the Restatement (Third) of Torts states on the topic of "statutory violations as negligence per se" that an actor is negligent if he or she violates a statute "designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of

---

nuisance and concluding that many courts have interpreted the various statutes to allow state common law claims for nuisance to remain viable despite existence of statute or compliance with permit issued pursuant to a statute); *see* Md. Heights Leasing v. Mallinckrodt, 706 S.W.2d 218, 223–24 (Mo. Ct. App. 1986) (stating that compliance with federal standards does not always indicate an absence of negligence); Brown v. County Comm'rs of Scioto County, 622 N.E.2d 1153, 1160 (Ohio Ct. App. 1993) (holding that a sewage-treatment plant with governmental authorization to operate cannot be an absolute statutory nuisance but can be a qualified statutory nuisance with liability based on negligent creation or maintenance of a condition that creates an unreasonable risk of harm and injury); Lunda v. Matthews, 613 P.2d 63, 67 (Or. Ct. App. 1980) ("Conformance with pollution standards does not preclude a suit in private nuisance."); Farber, *The Story of* Boomer, *supra* note 172, at 146–47 (citing Andrew Jackson Heimert, *Keeping Pigs out of Parlors: Using Nuisance Law to Affect the Location of Pollution,* 27 ENVTL. L. 403, 435–536 & nn.207 & 210 (1997)); *see also* 33 U.S.C. § 1342(k) (providing that compliance with a permit issued under the Clean Water Act is deemed to be compliance with federal law); 42 U.S.C. § 7661c(f) (providing that compliance with a permit issued in accordance with permit requirements of Clean Air Act shall be deemed compliance with various provisions of the Act).

persons the statute is designed to protect."[216] These same principles apply to claims for nuisance, which also can be based on statutory or regulatory violations.[217] Thus, if a plaintiff meets these requirements, she may recover damages or obtain an injunction for violation of a federal, state, or local statute or ordinance[218] under the doctrine of negligence per se or nuisance, even if the statute itself does not provide a private right of action.[219]

One of the comments to the proposed final draft of the Restatement (Third) of Torts states that "courts, exercising their common law authority to develop tort doctrine, not only should regard the actor's statutory violation as evidence admissible against the actor, but should treat that violation as actually determining the actor's negligence."[220] Thus, violation of the statute is negligence per se.[221] This language is much more direct than that used in the Restatement (Second) of Torts, perhaps because, as another comment to the proposed final draft of the Restatement (Third) of Torts recognizes, the significance of negligence per se "has expanded in recent decades, as the number of statutory and regulatory controls has substantially increased."[222] This trend can be found in judicial decisions since the 1970s, where courts have used newly enacted state and federal environmental standards to help define the duty of care in common law negligence claims and identify activities that constitute nuisances and/or are abnormally dangerous for purposes of applying strict liability.[223]

---

216. RESTATEMENT (THIRD) OF TORTS § 14 (Proposed Final Draft 2005).

217. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 415 (3d ed. 2000) (noting that the violation of a statute is one way to establish a nuisance).

218. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. a (Proposed Final Draft 2005) (stating that the section applies equally to regulations adopted by state administrative bodies, ordinances adopted by local councils, and federal statutes, as well as regulations promulgated by federal administrative agencies).

219. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 874A cmt. e (1979) (stating that at common law, violations of statutes and regulations can be used to establish both negligence per se and nuisance).

220. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (Proposed Final Draft 2005).

221. *Id.*

222. *Compare id.* cmt. d, *with* RESTATEMENT (SECOND) OF TORTS § 286 (stating that the court "may" adopt a legislative enactment or administrative regulation as the standard of care under certain circumstances).

223. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1050–52 (2d Cir. 1985) (allowing the state to establish public nuisance and obtain injunctive relief based on violations of various state laws relating to storage and disposal of hazardous waste); Akzo Coatings of Am., Inc. v. Am. Renovating, 842 F. Supp. 267, 273 (E.D. Mich. 1993) (allowing plaintiffs to establish nuisance and recover damages for violation of CERCLA provisions regarding arranging for disposal or treatment of hazardous substances); Hendler v. United States, 38 Fed. Cl. 611, 615–17 (Ct. Fed. Cl. 1997) (using the California Health and Safety Code to establish that contamination of groundwater is a public nuisance); Sanchez v. General Urban Corp., 19 Conn. L. Rptr. 97 (Conn. Super. Ct. 1997) (denying a motion to dismiss a complaint for damages based on child's ingestion of lead-based paint and holding that violation of regulatory requirements relating to lead paint can be used to establish negligence per se and absolute nuisance); Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 834–41 (Ill. 1981) (relying on

This trend is particularly notable in the development of common law strict liability in the context of environmental contamination. As a matter of common law, courts generally impose strict liability for harm either under the doctrine of *Rylands v. Fletcher*[224] or under the Restatement (Second) of Torts.[225] *Rylands* involved a defendant who constructed a reservoir on his land that burst and damaged his neighbor's land. In an 1868 decision, the English House of Lords held that the defendant was liable without a showing of negligence because he had brought something "unnatural" onto his land that caused damage.[226]

In contrast to the *Rylands* standard, under the Restatement (Second) of Torts, a defendant is subject to strict liability if the plaintiff establishes the activity that caused the harm is "abnormally dangerous."[227] The court decides this question as a matter of law based on balancing (1) whether the activity involves a high degree of risk of harm; (2) whether the gravity of harm from the activity is likely to be great; (3) whether the risk cannot be eliminated through the exercise of reasonable care; (4) whether the activity is not a matter of common usage; (5) whether the activity is inappropriate for the place where it occurs; and (6) the value of the activity to the community.[228]

In recent years, commentators have argued that courts have, for the most part, abandoned common law strict liability in favor of negligence as the dominant tort theory, apart from historic applications of strict liability

---

federal regulations governing use and disposal of PCBs and state regulations governing landfill operations to find that a landfill's operations constituted a nuisance); Koos v. Roth, 652 P.2d 1255, 1265–68 (Or. 1982) (using state statutory prohibition and regulations on field burning to find that defendant's field burning, which resulted in loss to the plaintiff, was an abnormally dangerous activity subject to strict liability); Bella v. Aurora Air, 566 P.2d 489, 495 (Or. 1977) (holding that in light of state legislation regulating aerial spraying of pesticides, defendant's aerial-spraying activities were abnormally dangerous and subject to strict liability); Pennsylvania v. Barnes & Tucker Co., 319 A.2d 871, 882–83 (Pa. 1974) (allowing the use of state constitution and Clean Streams Law to establish public nuisance); Branch v. W. Petroleum Inc., 657 P.2d 267, 272–76 (Utah 1982) (finding that violation of state water-pollution law supports nuisance per se and that defendant's oil wells were an abnormally dangerous activity and thus subject to strict liability); *see also* Klass, *supra* note 214, at 942–57 (discussing cases finding activities resulting in environmental contamination abnormally dangerous based in part on existence of CERCLA and state laws regulating release of hazardous substances). *But see* Schwartzman v. Atchison, Topeka & Santa Fe Ry., 857 F. Supp. 838, 848–51 (D.N.M. 1994) (holding that the plaintiff could not recover damages under negligence per se based on statutory violations because that would provide the plaintiff with a remedy not contemplated by the legislature); Grube v. Daun, 570 N.W.2d 851, 857 (Wis. 1997) (holding that regulation of underground storage tanks shows storage of gasoline can be conducted safely and thus strict liability is not appropriate).

224. Rylands v. Fletcher, 1 L.R.-Ex. 265 (1868).

225. RESTATEMENT (SECOND) OF TORTS §§ 519–520 (1979) (providing for strict liability for abnormally dangerous activities).

226. *Rylands*, 1 L.R.-Ex. at 330.

227. RESTATEMENT (SECOND) OF TORTS § 519.

228. *Id.* § 520.

for traditionally abnormally dangerous activities, such as blasting.[229] However, since the enactment of CERCLA in 1980, which imposes strict liability for the release of hazardous substances,[230] courts have increasingly imposed common law strict liability under *Rylands* or the Restatement in cases involving environmental contamination.[231] Indeed, when the Restatement Reporters drafted the Restatement (Third) of Torts for abnormally dangerous activities, virtually the only new category of cases given special mention in the commentary was that of environmental contamination.[232]

This new inclusion can be explained by courts looking to the strict-liability standard in CERCLA to inform common law and find strict liability as a matter of common law in cases involving environmental contamination.[233] Such decisions are significant because a plaintiff's remedy under CERCLA is limited to the recovery of costs to remediate a release of hazardous substances. If the plaintiff seeks to recover damages for personal injury, diminution in value to property, lost profits, or punitive damages, she must obtain such relief under common law.[234] For obvious reasons, the most powerful common law vehicle for recovering such damages is strict liability because the plaintiff need not prove the defendant was negligent or otherwise at fault. In relying on CERCLA to "update" a state's common law strict-liability doctrine in the area of environmental contamination, courts

229. *See, e.g.*, Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 598 (1999) (arguing that strict liability for abnormally dangerous activities "has evolved to the point of near extinction because courts have concluded that the negligence system functions effectively to deter the serious risks posed by the activities involved"); James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 405 (2002) (arguing that negligence should remain the dominant principle of American tort law and that attempts to hold commercial enterprises strictly liable for harm are not viable because such liability disputes would be unadjudicable, risks of loss would be uninsurable, and victims who are purchasers and consumers are best parties to be responsible for insuring against residual accident losses); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 221 (1973) (arguing that application of broad strict-liability theory is not economically efficient and imposes unavoidable costs on society without sufficient social value); *see also* Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (reasoning that negligence is more efficient and preferable to strict liability in all cases except where it is impossible to conduct the activity safely).

230. Plaintiffs in environmental-contamination cases often couple a CERCLA claim to recover costs of response with state common law claims for strict liability, negligence, or nuisance in order to seek compensatory damages, personal-injury damages, or punitive damages for which CERCLA provides no recovery. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1042–43 (2d Cir. 1985) (discussing strict liability under CERCLA); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983) (same).

231. *See* Klass, *supra* note 214, at 957–61.

232. *See* RESTATEMENT (THIRD) OF TORTS § 20 cmt. k, illus. 2 (Proposed Final Draft 2005).

233. *See* Klass, *supra* note 214, at 957–61.

234. *Id.* at 905.

are relying on related statutes to develop common law to reflect current norms and provide new coherence and consistency in that area of the law.

As another example, courts have looked to the growing number of environmental standards, particularly those addressing soil and groundwater cleanup, to modify common law theories of damages and allow recovery for permanent "environmental stigma" damages, in addition to costs of cleanup.[235] Historically, many jurisdictions allowed a plaintiff whose property was subject to damage to recover the lesser of the cost of repair or diminution in value of the property.[236] Which type of recovery was allowed also could depend on whether the damages were deemed "temporary" or "permanent."[237] As courts addressed more and more cases involving claims of nuisance, negligence, and strict liability for damages due to contaminated soil and groundwater, the distinction between temporary and permanent damages became more difficult to ascertain. When was a property truly clean? If the cleanup would take more than twenty years to complete, were those damages temporary or permanent? Was a plaintiff entitled to any recovery if the defendant was conducting remediation on the plaintiff's

235. *See, e.g.*, Mel Foster Co. Props. v. Amoco, 427 N.W.2d 171, 175 (Iowa 1988) (noting that as scientific progress allows for "society to successfully clean up pollution once thought to be permanent," it becomes easier to determine damages for liability); Terra-Prods., Inc., v. Kraft Gen. Foods, 653 N.E.2d 89, 92–94 (Ind. Ct. App. 1995) (applying a "diminution in fair market value analysis" to environmental damage); Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245–48 (Utah 1998) (determining the extent of the defendant's invasion and the gravity of the environmental damage to ascertain liability). "Environmental stigma" is an adverse impact on the value of a property based on the market's perception that the property poses an environmental risk. *See* UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, Advisory Op. 9, at 143–45 (Appraisal Standards Bd. 2003) (defining "environmental stigma" as "an adverse effect on property value produced by the market's perception of increased environmental risk due to contamination"). Such risk may be due to fear of potential liability for cleanup costs, potential liability to third parties affected by existing or prior contamination, or concerns regarding the ability to obtain financing for the property. *See* Dealers Mfg. Co. v. County of Anoka, 615 N.W.2d 76, 77 n.1 (Minn. 2000) (citing Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7, 7–8 (1988)).

236. *See* RESTATEMENT (SECOND) OF TORTS § 929 & cmt. b (1979) (stating that if a plaintiff is entitled to judgment from harm to land not resulting in total destruction of the property, that plaintiff can recover the difference between the value of land before and after the harm (i.e., diminution in value) or the reasonable cost of restoration, but if cost of restoration far exceeds diminution in value or total value of the property, limiting the plaintiff's remedy to diminution in value may be appropriate). *But see* Bd. of County Comm'rs v. Slovek, 723 P.2d 1309, 1309 (Colo. 1986) (refusing to hold as a bright-line rule that a plaintiff's repair costs may not exceed the diminution in value of the property caused by the harm or even the pretort value of the property); Reeser v. Weaver Bros., 605 N.E.2d 1271, 1271 (Ohio Ct. App. 1992) (same); MADDEN & BOSTON, *supra* note 86, at 255–59 (discussing the Restatement and cases).

237. *See, e.g.*, Kirkbride v. Lisbon Contractors, 560 A.2d 809, 812–13 (Pa. Super. Ct. 1989) (holding that plaintiff may recover damages for diminution in property only if the damage is permanent, otherwise plaintiff should recover only the cost of repair); MADDEN & BOSTON, *supra* note 86, at 266–67 (stating that the distinction between temporary and permanent damages is relevant because historically if injury to land is permanent, the owner may recover diminution in value, but not if the damage is temporary).

property? To address these questions, courts began awarding stigma damages in a variety of cases in the late 1980s. The developments in this area drew heavily on the new statutory liabilities for property contamination that CERCLA and state law had begun imposing on a wide range of property owners.[238]

For instance, in 1988, the Iowa Supreme Court held that the proper measure of damages for contaminated property can be diminution in the market value of the property even if the nuisance is classified as temporary and the pollution has been abated.[239] In so holding, the court rejected the distinction between temporary and permanent nuisances for purposes of determining the measure of damages. The court explained that groundwater contamination "does not fit neatly into a category as either a temporary or permanent nuisance."[240] As a result, the court found that prior cases relying on that distinction were simply "not instructive in dealing with chemical pollution to real estate which will remain in the soil for an indefinite period of time."[241]

The court concluded that chemical contamination contains aspects of both a permanent and a temporary nuisance. This is because even though the contamination will ultimately be abated, it will continue for an indefinite but significant period of time, thus constituting a damage to the ground itself.[242] Moreover, while changing technologies and scientific advances allow for the cleanup of pollution once thought to be permanent, they also reveal "hidden dangers in chemicals once thought to be safe."[243] Thus, the court held that when a nuisance results in contamination for an indefinite period of time, the plaintiff can recover diminution in the market value of the property even when the source of the contamination has been abated or the nuisance is classified as temporary.[244]

Similarly, the Utah Supreme Court held in 1998 that plaintiffs seeking diminution in property value from a gas station under theories of trespass and nuisance could recover such damages for stigma to the property even after the defendants remediated the contamination.[245] In doing so, the court recognized the significant burdens CERCLA and other laws were now

238. *See generally* 42 U.S.C. §§ 9601–9675 (2000); Klass, *supra* note 214, at 920–23 (discussing enactment of CERCLA in 1980 and basic liability provisions).

239. Mel Foster Co. Props. v. Amoco, 427 N.W.2d 171, 175 (Iowa 1988).

240. *Id.* at 174.

241. *Id.*

242. *Id.*

243. *Id.* at 175.

244. *Mel Foster Co. Props.*, 427 N.W.2d at 175; *see also* Terra-Prods. v. Kraft Gen. Foods, 653 N.E.2d 89, 92–94 (Ind. Ct. App. 1995) (rejecting the defendant's argument that a plaintiff could not recover environmental-stigma damages because damage was temporary and defendant had already remediated the property).

245. Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1238 (Utah 1998).

imposing on contaminated properties, leaving them in financial limbo for years, if not decades, and significantly reducing their market value.

In support of the plaintiffs' damages claims, fact and expert witnesses testified that public perception of contaminated properties worsened in the area after 1990 when buyers became more sophisticated about environmental contamination and recognized the legal liability associated with such contamination.[246] These witnesses also referred to regulatory changes that increased the impact of environmental contamination on property values.[247] Based on this evidence, the court reversed the lower court's summary-judgment decision for the defendant and directed the trial court to admit the testimony on environmental stigma for purposes of calculating damages.[248]

These cases demonstrate that courts have altered their common law doctrines for property damage to recognize the new liability scheme and market conditions that CERCLA and state laws have created relating to the cleanup of contaminated property. Once Congress and state legislatures imposed strict, joint, and several liability for the release of hazardous substances, any potential landowner could be held responsible for millions of dollars of cleanup costs even if they were not responsible for the contamination and were unaware of it when they purchased the property.[249] These legal developments had a significant impact on the market for contaminated properties, and real estate appraisers began to study the concept of environmental stigma for the first time soon after CERCLA's enactment.[250] At the same time, plaintiffs began presenting such testimony, and the courts altered the common law of remedies to reflect these changes in the market brought about by the federal and state environmental laws.[251]

---

246. *Id.* at 1247.

247. *Id.*

248. *Id.* at 1247–48.

249. *See, e.g.*, CERCLA § 107, 42 U.S.C. § 9607 (2000) (enumerating parties responsible for costs of response associated with hazardous substances); PERCIVAL ET AL., *supra* note 35, at 226–27, 257–58 (discussing CERCLA liability provisions); Klass, *supra* note 214, at 920–21 (same).

250. The concept of environmental stigma did not even exist in the real-estate appraisal literature until the mid-1980s and was not subject to any significant treatment until the 1990s. *See* William N. Kinnard, Jr. & Elaine M. Worzala, *How North American Appraisers Value Contaminated Property and Associated Stigma*, 67 APPRAISAL J. 269, 270 (1999) (stating that the literature on the effects of contamination on real property in the United States dates from approximately 1984, but that only a handful of articles and papers appeared before 1991).

251. While most courts appear to require some initial physical impact to the plaintiff's property to recover for environmental stigma, at least one state supreme court has noted that environmental stigma is recoverable even in the absence of physical impact. *See* Dealers Mfg. Co. v. County of Anoka, 615 N.W.2d 76, 79–80 (Minn. 2000) (stating that stigma may attach to property that is not itself contaminated); MADDEN & BOSTON, *supra* note 86, at 269 ("The cases awarding stigma damages appear to be nearly uniform in demanding some actual physical injury to the property as a precondition of recovery."); *see also* E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. ENVTL. L. & POL'Y

On the whole, courts' use of the new environmental statutory and regulatory standards to inform and develop the law of nuisance, negligence, and strict liability shows the dynamic potential of common law to address modern-day concerns. As stated earlier, state common law claims cannot and should not substitute for strong federal legislation and regulation, which can control pollution more broadly without many of the evidentiary requirements needed to establish common law violations. Nevertheless, by integrating statutory and regulatory standards into state common law, the common law can work side by side with the statutory and regulatory framework to provide incentives to control pollution and protect the environment.

2. Judicial Use of New Data and Expertise to Advance State Common Law

The new environmental laws of the 1970s and 1980s brought with them not only new liability standards and policy directives but also the creation of new expertise and data in areas including air pollution, water pollution, waste disposal, environmental assessment, and remediation techniques. This Section explores how courts have used this new statutory-driven expertise and data in developing common law doctrines related to environmental protection and contamination, including nuisance, trespass, strict liability, and the public trust doctrine. Once again, even though courts generally are not explicit about how and why they are using this new information to move the common law forward, a review of the holdings and reasoning of these cases shows this trend.

As noted earlier, one of the primary concerns of the *Boomer* court in refusing equitable relief on the plaintiffs' nuisance claim was the lack of data, standards, and scientific evidence that would allow the court to evaluate adequately the merits of the case.[252] Justice Holmes expressed a similar concern in the interstate water-pollution case of *Missouri v. Illinois*.[253] In this case, the Supreme Court denied Missouri's request to enjoin the discharge of Chicago sewage, which Chicago had recently engineered to flow away from Lake Michigan and into the Mississippi River by reversing the flow of the Chicago River. The Court held that Missouri could not establish a causal connection between the sewage discharges and an increase in pollution and disease.[254]

In reaching this decision, Holmes noted this was not "a nuisance of the simple kind that was known to the older common law" because there was no visible or olfactory evidence of contamination and because the additional

185, 189–230 (1996) (discussing stigma damages and judicial decisions awarding stigma damages).

252. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

253. Missouri v. Illinois, 200 U.S. 496 (1906).

254. *Id.* at 526.

volumes of water from Lake Michigan flowing into the river had arguably improved the water quality of the Mississippi.[255] The Court reviewed evidence and studies that typhoid fever had increased in Missouri since the addition of Chicago sewage and concluded that the studies were inconclusive.[256] Ultimately, Holmes recognized that "[w]hat the future may develop of course we cannot tell"[257] but that the plaintiff's case failed for lack of causation and because it depended upon "an inference of the unseen."[258] Thus, the *Boomer* court's concern over imposing injunctive relief based on limited science and data certainly was not a new concern.

However, this should be of much less importance today. The new federal and state environmental statutes of the 1970s and 1980s established expert agencies and funding for vast numbers of studies and data-collection opportunities in areas of air pollution, water pollution, toxic substances, remediation, and pollution-control techniques. Professor Richard Revesz has documented how this growth in expertise has increased the competence and experience of state and local environmental officials who establish and implement state statutory and regulatory policy.[259] One can observe this same phenomenon in the ability of increasingly qualified expert witnesses in environmental lawsuits to provide the scientific expertise and data needed to overcome, at least in part, the concerns expressed in *Boomer* and *Missouri* and to develop common law tort theories to address environmental harm.

For instance, the Washington Supreme Court held in 1985 that its common law rule that microscopic particles could be a nuisance but not a trespass because of the lack of an observable and direct physical invasion no longer made sense in modern, scientific times.[260] The court agreed that the trespassory consequences of such particles were no less "direct" even if the mechanism of delivery was more complex or the particles were not visible to the naked eye.[261] Likewise, the New Jersey Supreme Court in 1983 used the growing knowledge of the hazards of toxic wastes, various federal reports on the harm pollution caused to the environment, and the growing societal problem of dumping untreated waste in New Jersey to hold that actions resulting in mercury pollution of state waterways were abnormally dangerous and subject to strict liability.[262]

---

255. *Id.* at 522.

256. *Id.* at 522–26.

257. *Id.* at 526.

258. *Missouri*, 200 U.S. at 522.

259. Revesz, *supra* note 127, at 626–30.

260. Bradley v. Am. Smelting & Ref. Co., 709 P.2d 782, 787–89 (Wash. 1985) (citing Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959); WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.13 (1977)); *see also* J.H. Borland v. Sanders Lead Co., 369 So. 2d 523, 526–29 (Ala. 1979) (contrasting modern trespass and nuisance tests with common law rules).

261. *Bradley*, 709 P.2d at 787–89.

262. Dep't of Envtl. Prot. v. Ventron, 468 A.2d 150, 492–93 (N.J. 1983).

An Illinois case in 1981 found that a chemical-waste disposal site was a nuisance based in large part on the potential risks of harm from polychlorinated biphenyls ("PCBs") at the site.[263] The court placed significance on the growing knowledge of the dangers of PCBs and the fact that they were banned beginning in 1979.[264] A federal court in Kentucky in 1993 also relied on the increasing evidence and documentation regarding the dangers of PCBs in holding that a gas-pipeline company using PCBs could be strictly liable for contamination of nearby properties.[265]

Courts have also relied on the growth of environmental knowledge to use common law theories such as the public trust doctrine[266] to protect wetlands and other resources from development pressures. For instance, as early as the 1970s, state courts used the public trust doctrine to protect inland wetlands and tidelands based on the growing recognition that one of their most important uses is "preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life."[267] More recently, in 2000, the Hawaii Supreme Court extended the scope of the public trust doctrine to groundwater based on the fact that "[m]odern science and technology have discredited the surface-ground dichotomy" and that there was no sense in "adhering to artificial distinctions" not supported by "practical realities."[268] Courts in states with large coastal areas have also used the public trust doctrine in recent years to support erosion-control measures or to prevent development in coastal areas. These courts have affirmed state action in this arena based on the

263. Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981).

264. *Id.* at 828–31.

265. *See generally* Fletcher v. Tenneco, Civ. No. 91–118, 1993 WL 86561 (E.D. Ky., Feb. 22, 1993). The published version of this opinion was originally found at 816 F. Supp. 1186, but was subsequently withdrawn from the bound volume at the request of the court as a result of a settlement between the parties. Telephone Interview with W. Patrick Murray, Counsel for Plaintiffs (Mar. 17, 2004).

266. The "public trust doctrine" has its origins in Roman and English law and requires states to hold navigable waters and the submerged lands under navigable waters "in trust" for the citizens of the state. Since the 1970s, it has been expanded in some jurisdictions to protect wetlands, species habitat, parkland, and drinking-water resources. *See, e.g.*, RODGERS, *supra* note 260, § 2.16.

267. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); *see also* Smithtown v. Poveromo, 336 N.Y.S.2d 764, 775 (N.Y. App. Div. 1972), *rev'd on other grounds sub nom.* People v. Poveromo, 359 N.Y.S.2d 848, 851 (N.Y. App. Div. 1973) (stating in the context of discussing the public trust doctrine that "[w]e now know that wetlands perform useful functions" and act "as a buffer against the ravages of the sea, cleanser of the incoming tide, a base for the marine food chain, nesting grounds for birds and particularly endangered species"); Just v. Marinette County, 201 N.W.2d 761, 767–68 (Wis. 1972) (stating that while swamps and wetlands were once considered "wasteland," people have become "more sophisticated" and realize that these resources "serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams").

268. *In re* Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000).

threat to national resources that is "not just environmental" but also critical to "the health, safety, and welfare of our people, as coastal erosion removes an important barrier between large populations and ever-threatening hurricanes and storms."[269]

These cases show that courts are using new knowledge about wetlands, marshes, and other water resources once considered useless or dangerous swamp lands to protect those lands through the historic common law public trust doctrine. In doing so, courts are using their common law powers under their own state law to protect human health and the environment based on new information generated largely by the vast federal and state regulatory system that now governs these resources.

Finally, the availability of more sophisticated expert testimony stemming from new regulatory expertise has allowed courts more easily to enjoin activities that may harm the environment. For instance, the Oklahoma Supreme Court in 1996 enjoined the construction and operation of a landfill under a claim of anticipatory nuisance based on expert testimony involving water-resource engineering, hydraulics, hydrology, remediation techniques, and modern-day landfill technology.[270] The court's detailed analysis of the expert testimony helps illustrate just how far science and expertise in the area of pollution control have come since the *Boomer* era of the 1970s.[271]

For example, the court focused on the fact that one of the plaintiff's experts not only was a professional engineer with a career working for the government, teaching at universities, and working in the private sector, but also had considerable experience in the design and construction of hazardous and solid-waste landfills.[272] Such experience, of course, would be gained primarily after the enactment of the Resource Conservation and Recovery Act ("RCRA")[273] in 1976, which established requirements for the storage and disposal of solid and hazardous waste. As a result of the growing expertise of individuals in environmental science and the vastly increased quality and quantity of data, common law courts need not abstain from

269. Avenal v. State, 886 So. 2d 1085, 1101 (La. 2004) (finding that a diversion project that would impact private interests in oyster beds was not an unconstitutional taking in part because the project promoted protection of public trust resources); *see also* Parker v. New Hanover County, 619 S.E.2d 868, 875–76 (N.C. Ct. App. 2005) (holding that a special assessment for an inlet-relocation project was not unconstitutional based in part on the public trust doctrine and noting the importance of North Carolina's coastal areas and the concerns related to recent hurricanes). These judicial concerns were clearly born out by the massive disaster resulting from Hurricane Katrina in 2005. *See, e.g.*, Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 3, 16–17 (2006) (discussing the impact of historic development and erosion as part of the physical challenges facing New Orleans after Hurricane Katrina).

270. Sharp v. 251st St. Landfill, Inc., 925 P.2d 546, 552–53 (Okla. 1996).

271. *Id.* at 550–53.

272. *Id.* at 550–52.

273. 42 U.S.C. §§ 6901–6992k (2000).

deciding "hard" environmental cases for lack of sufficient expertise or evidence.

B. DEVELOPING STATE COMMON LAW IN THE AGE OF THE REGULATORY STATE TO INCREASE ENVIRONMENTAL PROTECTION AND CREATE A NEW COHERENCE IN THE LAW

In most of the cases discussed above, private parties relied on common law tort theories to obtain damages and injunctive relief for personal injury or property damages.[274] By contrast, since the 1980s, state governments could often more easily rely on their authority under the federal environmental statutes to achieve their environmental goals.[275] In the last few years, however, states have been increasingly frustrated that the federal government no longer has environmental protection as a priority, and thus, states are more active in setting their own environmental policy.[276]

Recent examples of this phenomenon at a statutory level are the efforts of California and several Northeastern states to set vehicle greenhouse-gas emission standards, the Northeastern regional carbon dioxide cap-and-trade program, state carbon dioxide emissions limits for power plants, multistate lawsuits to compel federal carbon dioxide regulations, and new state mercury-reduction requirements that are far more stringent than federal standards.[277] While these efforts (primarily in the area of air pollution) are significant, the same phenomenon can be seen equally in recent state efforts to use their own state courts and common law to achieve environmental goals. For instance, in 1999, the State of Rhode Island filed the first lawsuit

---

274. An exception to that generalization is a case like *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), where the state used the common law to obtain injunctive relief to force remediation where CERCLA did not provide such a remedy for states.

275. *See* PERCIVAL ET AL., *supra* note 35, at 101 (discussing the model of "cooperative federalism" established in most federal environmental statutes encouraging state governments to assume authority for federal programs within their states).

276. *See supra* note 200 and accompanying text; *see also* Carolyn Whetzel, *California, United Kingdom Agree on Plan to Address Environmental, Economic Issues*, DAILY ENVTL. REP. (BNA) No. 147 (Aug. 1, 2006), at A8 (discussing the agreement between British Prime Minister Tony Blair and California Governor Arnold Schwarzenegger to address climate change and the Governor's written statement that "California will not wait for our federal government to take strong action on global warming").

277. *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (holding that the EPA has authority to decline to regulate greenhouse gases under the Clean Air Act in response to a state petition to the EPA asking it to undertake such regulation), *cert. granted*, 126 S. Ct. 2960 (2006); Bologna, *supra* note 208, at 91 (reporting on Illinois Governor's state mercury-reduction plan that would force coal-fired power plants to cut toxic emissions far below federal targets because "[t]he new federal mercury regulations don't go far enough in protecting the public from what we know are very dangerous emissions"); Scott, *supra* note 208, at S-11–S-16 (discussing the efforts of California and several other states to set binding reductions on carbon-dioxide emissions and air toxics); Kathy Lundy Springuel, *Governor Unveils Draft Rule to Cut Emissions from Coal-Fired Plants*, 21 TOXICS L. REP. (BNA) 61 (Jan. 19, 2006) (reporting on the Maryland Governor's draft plan to cut emissions of nitrogen oxides, sulfur dioxide, and mercury far beyond federal requirements).

by a state against the lead-paint industry to require the industry to pay for inspection, testing, and remediation under the state's common law of nuisance.[278] In 2006, North Carolina filed a lawsuit against the Tennessee Valley Authority claiming that emissions from plants owned by the federal power authority in several states were harming individuals and the economy.[279] The suits are being brought under the source states' public-nuisance laws.

On a broader scope, states and municipalities are attempting to address massive groundwater-contamination problems from the use of the gasoline additive methyl tertiary butyl ether ("MTBE") in the face of federal inaction.[280] The EPA approved MTBE as a fuel additive in 1979 to replace lead and then, in 1990, the Clean Air Act Amendments required petroleum companies to market reformulated gasoline in certain markets with significant air pollution, increasing the market for and use of MTBE nationwide.[281] In the late 1990s, however, studies showed significant MTBE contamination in groundwater supplies across the country and a potential carcinogenic risk to humans from MTBE.[282] MTBE contamination is very difficult to remediate, and current estimates on the cost of cleanup nationwide range from $25 billion to $85 billion.[283] Currently, California, New York, and six other states have banned the use of MTBE.[284] However, the EPA has refused to ban or limit MTBE under the Toxic Substances Control Act despite issuing an Advance Notice of Proposed Rulemaking on the topic in 2000.[285]

In addition to regulatory efforts limiting the prospective use of MTBE, states and municipalities are using common law tort theories to address

278. Martha Kessler, *Rhode Island Judge Refuses to Step Aside in State's Suit Against Lead Paint Makers*, 20 TOXICS L. REP. (BNA) 793, 793–94 (Sept. 1, 2005).

279. North Carolina v. Tenn. Valley Auth., 439 F. Supp. 2d 486 (W.D.N.C. 2006) (denying a motion to dismiss and allowing state nuisance claim to proceed); Andrew M. Ballard, *North Carolina Lawsuit Against TVA Alleges Harm from Power Plant Emissions*, 37 ENV'T REP. 221, 221 (2006).

280. *See infra* notes 284, 286–91 and accompanying text.

281. New Hampshire v. Dover, 891 A.2d 524, 527 (N.H. 2006) (detailing the history of MTBE use in gasoline); Symposium, *The Role of State Attorneys General in National Environmental Law Policy*, 30 COLUM. J. ENVTL. L. 403, 404–05 (2005). *See generally* Thomas O. McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 371 (2005) (detailing the regulatory history of MTBE and evidence of adverse health impacts and groundwater-pollution problems).

282. *See* Press Release, Envtl. Working Group, EPA Draft Says MTBE a "Likely" Cause of Cancer (July 11, 2005), http://www.ewg.org/issues/MTBE/20050711/index.php (last visited Jan. 25, 2007) (discussing EPA draft risk assessment in 2005 stating MTBE is a "likely" cause of cancer).

283. *See* Gov't Affairs Staff, Am. Water Works Ass'n, Two Updated Analyses Pin MTBE Clean Up Costs Between $25–$85 Billion (June 21, 2005), http://www.awwa.org/Communications/news/index.cfm?ArticleID=459 (discussing estimated cleanup costs).

284. *See* McGarity, *supra* note 281, at 379–80 & n.46.

285. *Id.* at 393–94.

MTBE contamination. Municipalities and other water providers in several states are in the midst of a multidistrict lawsuit consolidated in the Southern District of New York against various gasoline producers based on claims of nuisance, negligence, trespass, and other state common law and statutory theories to recover for contamination or threatened contamination of groundwater by MTBE.[286]

Likewise, the South Lake Tahoe Public Utility District sued several major gasoline companies in 1998 after MTBE pollution forced it to close a third of its drinking-water wells near Lake Tahoe, California.[287] In August 2002, the parties reached a settlement after a ten-month jury trial, in which the defendant companies agreed to pay $69 million to remediate the contaminated wells.[288] Prior to the settlement, the jury had found that the defendants had knowingly placed a defective product on the market when they began selling gasoline with MTBE, potentially exposing the companies to billions of dollars in cleanup costs and punitive damages.[289] States, in addition to local governments, have brought lawsuits to recover for MTBE contamination. The State of New Hampshire filed suit in New Hampshire state court in 2003 for claims including negligent water pollution and strict products liability against numerous gasoline manufacturers and distributors seeking damages and injunctive relief for contaminating the groundwater of all but one county in the state.[290] These public-entity lawsuits are in addition to the numerous lawsuits brought by private parties for MTBE contamination. State and other public entities are resorting to state common law to achieve their goals in a manner not generally seen since prior to the 1970s.[291]

---

286. *In re* MTBE Prod. Liab. Litig., 379 F. Supp. 2d 348, 361 (S.D.N.Y. 2005).

287. Complaint, S. Tahoe Pub. Util. Dist. v. Atl. Richfield Co., No. 999128 (San Fran. Super. Ct. Nov. 10, 1998), *available at* http://www.sftc.org (follow "Case Number Query" hyperlink and enter No. 999128); Jane Kay, *2 Oil Giants Deceived Public on MTBE's Hazards, Jury Finds*, S.F. CHRON., Apr. 17, 2002, at A1.

288. Tyler Cunningham, *Oil Companies Settle Lawsuit over MTBE in Lake Tahoe—the Long-Running Case Will Not Mark a Legal Precedent Because of the Deal, but Will Surely Have a Wide Impact*, S.F. DAILY J., Aug. 6, 2002.

289. Kay, *supra* note 287, at A1.

290. New Hampshire v. Dover, 891 A.2d 524, 531–32 (N.H. 2006) (declaring that the state MTBE suit should displace separate similar suits by municipalities under the doctrine of parens patriae and setting forth claims in a suit by the state against gasoline-company defendants). The State of New Hampshire alleged that MTBE was present in hundreds of public water systems and approximately 40,000 private water supplies. *Id.* at 529–30.

291. For a chart showing the lawsuits brought by public water supplies, see EWG ACTION FUND, LIKE OIL AND WATER: AS CONGRESS CONSIDERS LEGAL IMMUNITY FOR OIL COMPANIES MORE COMMUNITIES GO TO COURT OVER MTBE POLLUTION, http://www.ewg.org/reports/oilandwater/lawsuits.php (last visited Jan. 25, 2007). For data on the number of water systems and populations affected by MTBE contamination, see EWG ACTION FUND, LIKE OIL AND WATER: AS CONGRESS CONSIDERS LEGAL IMMUNITY FOR OIL COMPANIES MORE COMMUNITIES GO TO COURT OVER MTBE POLLUTION, http://www.ewg.org/reports/oilandwater/part2.php (last visited Jan. 25, 2007). *See also* Symposium, *The Role of State Attorneys General in National*

On the whole, it is true that state common law initiatives may necessarily be more limited in scope than federal common law, which has the potential to address larger, multistate pollution issues. However, *Milwaukee II* has foreclosed the use of federal common law nuisance for interstate water pollution, and the recent efforts of states to use federal common law nuisance for interstate air pollution have not been successful, although that may change on appeal or with future suits.[292] As a result, careful consideration of targeted state common law efforts, which can rest on principles of the "new federalism," can have significant effects on environmental quality. Recent efforts on MTBE contamination, greenhouse-gas control, and lead-paint issues are merely examples of how nuisance, negligence, strict liability, and other state common law claims can at least partially address the current issues faced by public entities as they did in the 1980s and 1990s for private parties seeking to obtain relief beyond that provided by environmental statutory law.

There are, to be sure, potential roadblocks that could prevent using state common law for progressive change. Despite the Supreme Court's recent embrace of "new federalism" principles, there is increased political pressure to invoke federal authority to rein in judicial protection of citizens in environmental and other cases through state law. One example is the U.S. Justice Department's recent arguments to the Supreme Court that federal pesticide law should preempt state statutory and common law claims for damages.[293] Another is the U.S. Food and Drug Administration's attempt to use new federal drug-labeling regulations to preempt state law failure-to-warn claims for recovering damages for injury.[294] Moreover, it was only at the

---

Environmental Policy, Groundwater Pollution Panel, *supra* note 200, at 409 (discussing MTBE lawsuits nationwide).

292. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 273 (S.D.N.Y. 2005) (dismissing on "political question" grounds an action by several states against Midwestern power plants for failure to reduce greenhouse-gas emissions under federal common law of nuisance); *supra* note 112 and accompanying text.

293. Bates v. Dow Agrosciences, 544 U.S. 431, 449 (2005) (rejecting the Justice Department's argument in favor of broad FIFRA preemption of state law tort claims for damages).

294. *See, e.g.*, Witczak v. Pfizer, 377 F. Supp. 2d 726, 730 (D. Minn. 2005) (rejecting a drug manufacturer's preemption argument under a prior FDA rule in the plaintiff's failure-to-warn claim to recover for a suicide alleged to be associated with the drug Zoloft and stating that the Justice Department's position that such claims were preempted did not have the force of law, and that FDA regulations provided a floor, but not a ceiling, for disclosure of drug-safety information); Colacicco v. Apotex, 432 F. Supp. 2d 514, 518 (E.D. Pa. 2006) (holding that federal drug law and FDA labeling regulations impliedly preempt common law claims based on inadequate labeling); Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933–3936 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601) (stating that both old-rule and new-rule FDA approval of labeling under federal law preempts conflicting or contrary state law, and thus acts as both a "floor" and a "ceiling" with regard to information required to be provided by manufacturers to consumers, despite judicial decisions to the contrary); Letter from Nat'l Conference of State

last minute that Congress removed a provision of the Energy Policy Act of 2005 that would have shielded gasoline manufacturers from product-liability lawsuits associated with MTBE contamination.[295] Similar efforts likely will be seen in the future, particularly as costs associated with MTBE and other environmental liabilities rise. Such use of federal law, particularly in the environmental area, is nothing new. Corporate interests were strong supporters of certain major federal environmental initiatives such as the Clean Air Act because they much preferred national, uniform standards that they could more easily influence through the federal legislative process than a patchwork of state requirements, many of which had the potential to be far more stringent than those ultimately enacted on a federal level.[296]

Thus, the balance between the states and the federal government over setting and implementing environmental policy will continue to shift in the years ahead. Future developments in engineering and science along with changing attitudes toward environmental problems such as global warming will also affect whether federal and state governments will increase protection for the environment or decrease it in favor of minimizing the economic effects on business. Within this big picture of environmental law and policy, however, is the central role courts have played and will continue to play in developing common law to address current needs with regard to environmental protection and compensation for environmental harms. The building blocks for state common law are there for those who wish to use them as a progressive force. Courts and litigants need only look for guidance in the writings of Pound, Cardozo, Landis, and others, along with judicial application of their work starting with *Moragne* and continuing with more recent developments in state common law relating to trespass, strict liability, stigma damages, and the public trust doctrine. Such common law development not only will update historic legal theories to address modern problems, but can do so in a way that integrates statutes and common law into a more coherent whole.

Legislatures to Hon. Mike Leavitt, Sec'y of U.S. Dep't of Health & Human Servs. (Jan. 13, 2006), *available at* http://www.ncsl.org/programs/press/2006/060113Leavitt.htm (expressing opposition to inclusion of language in final FDA rule that would seek to preempt state product liability laws).

295. *See* Debra DeHaney-Howard, *Major Victory for Mayors on MTBE Liability Protection*, U.S. CONF. OF MAYORS (Aug. 8, 2005), *available at* http://www.usmayors.org/uscm/us_mayor_newspaper/documents/08_08_05/MTBE.asp.

296. *See, e.g.*, PLATER ET AL., *supra* note 140, at 299–300 (discussing scenarios where industries lobby Congress to enact federal standards over fear of more stringent state standards in areas of auto emissions, pesticide regulations, and control of additives in laundry detergent and gasoline); Elliott et al., *supra* note 126, at 330–33 (explaining how auto industry and soft-coal industry reversed course to support federal air-pollution legislation in the 1960s and 1970s because federal legislation was preferable to state legislation); Revesz, *supra* note 127, at 573 (noting that, in the mid-1960s, the automobile industry began to advocate for federal auto-emission standards provided that such standards would preempt more stringent state standards).

VI. CONCLUSION

This Article explores the growth of federal statutes and the rise of the regulatory state to show how statutory law has been used to displace state common law even in the absence of express or implied preemption. A review of the legal theory on the relationship between statutory law and common law shows, however, that statutes can, and should, be used to develop and inform state common law so that the common law may work alongside statutes to create a body of law that addresses the legal issues of the day. The varying paths of common law are illustrated in the development of environmental law from its common law tort beginnings, to its statutory and regulatory growth beginning in the 1970s, to recent efforts to revive state common law to address modern-day environmental problems that the federal regulatory state cannot or will not address. As this development illustrates, state common law can be a powerful tool for environmental protection if courts can expand its scope to include the policies, data, and standards that related statutes and regulations now make available. In this way, we can not only create a vibrant and progressive state common law but add a new coherence to the field as a whole by integrating all sources of environmental law and allowing them to work together to shape environmental-protection efforts.